Supreme Court, U.S.
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OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY FORTE,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the discharge of a black, female Veterans Affairs Medical Center nurse with ten years service, premised upon her private utterance to a black, male Veterans Affairs Medical Center police sergeant that he is an "ass-kissing Uncle Tom nigger" repugnant to the First Amendment to the Constitution?

2. Is the pretextual discharge of a Chief Steward of the Union Local at the Veterans Affairs Medical Center, under the false pretense that she was fired for her inappropriate private comments to a fellow employee, repugnant to the First Amendment to the Constitution?

3. Is the discharge of a black, female nurse with ten years federal service for a first offense in which she called a black, male police officer co-worker, in private, "an ass-kissing Uncle Tom nigger" repugnant as cruel and unusual punishment and excessive fines within the Eighth Amendment to the Constitution?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

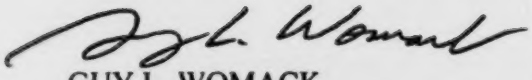
1 Dorothy Forte;

2. Department of Veterans Affairs;

3. Michael Duclos, Esquire, Counsel for Respondent;

4. Solicitor General of the United States; and

5. Guy L. Womack, Esquire, Counsel for Petitioner.



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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals, Federal Circuit, was rendered on June 9, 1999. Jurisdiction to review said judgment herein by writ of certiorari is conferred on This Court by Title 28, U. S. Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

and

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTES INVOLVED

Title 5, United States Code, Section 7121 (See Appendix 74)

Title 5, United States Code, Section 7512 (See Appendix 79)

Title 5, United States Code, Section 7703 (See Appendix 80)

Title 28, United States Code, Section 1254(1):

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE CASE

A. Material Facts

On the morning of February 21, 1997, Ms. Forte, fifty-one year old black female and the Chief Steward for the Professionals section of the American Federation of Government Employees, Local 1633 ,was in a leave status and reported to the lobby of the Veterans Affairs Medical Center, Houston, Texas, for the purpose of handing out flyers notifying Local members of her desire to call a meeting of the membership to address the ouster of Abraham Gordon as a Local official by its then-acting president, Haymon Parker. [35-39]. [1]

Mr. Warren Robicheaux, a Medical Center administrative official, saw Ms. Forte in the lobby passing out the flyers. When he read that she was proposing to call a lunchtime meeting of union membership to address the ouster of Mr. Gordon and that the meeting was to convene in the auditorium, he demanded she stop handing out the flyers. [37].

Ms. Forte informed Mr. Robicheaux that she was in an off-duty status, and was in the lobby of the Medical Center conducting protected, union-related activity. [37].

Medical Center Chief of Police Burke was summoned to the lobby, identified himself to Ms. Forte as the new Chief and ordered her to stop distributing the flyers. Ms. Forte at first refused, then capitulated and stopped distributing the flyers. [37-39].

Chief Burke then ordered her to leave the lobby area, but Ms. Forte refused. Four uniformed officers approached Ms. Forte and, when she continued to refuse to leave the lobby, wrestled her to the floor, handcuffed her and carried and dragged her out of the lobby. During the course of the apprehension, two officers were struck or kicked by Ms. Forte as she struggled to prevent them from handcuffing her and they suffered minor bruising to their arms or legs. [38, 39].

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[1] The record on appeal is cited as follows: Appendix [Page Number].

On March 21, 1997, Ms. Forte was in her office when she was contacted by a Medical Center police officer and was asked to accompany the officer to the police station. [40].

When Ms. Forte arrived in the police station, she was given a Bar letter and was questioned by Sergeant Gray, alone in his office, about a claim by then-Union Local President Haymon Parker that she had threatened him. [41].

Ms. Forte, a black female, was angered about this questioning and the bar letter and stated to Sergeant Gray, a black male, that "you're nothing but an ass-kissing Uncle Tom nigger." She also told him that her brother, a Houston Police Department officer, had told her that the Medical Center Police were "nothing but a bunch of Keystone Cops." [41, 95].

Ms. Forte was given a citation for this matter and for the February 21 incident. [96].

As a result of Ms. Forte's efforts, an election was scheduled for May 9, 1997 for the purpose of electing a Local president and two vice presidents. [96, 97].

Ms. Forte was a candidate for Vice President of the Professionals section and Abraham Gordon ran for Local President. [96-99].

On about April 2, 1997, the Director of the Veterans Affairs Medical Center, Houston, Texas, signed and caused to be delivered to Ms. Forte a letter of proposed discharge. [84-87, 96].

On April 25, 1997, about two weeks before the election, Ms. Forte arranged to visit the Medical Center to post campaign literature and to conduct other official business. When she arrived, there was an incident in which she was attacked by Chief Burke, yet she was charged with assault in the matter. [96].

On May 2, 1997, the Agency issued its decision and removed Ms. Forte from her employment with the Medical Center. [82, 83].

The matters of February 21 and April 25, 1997 were forwarded to the U. S. Attorney's office and , in December, 1997, Ms. Forte was tried on these charges. She was convicted of the February 21st incident, under the

premise that, although she was conducting protected activity at the time Robicheaux ordered her to desist and when approached by Chief Burke, she should have complied with their illegal order and then filed a grievance, rather than getting into a struggle with police officers.

Ms. Forte was acquitted of the charge stemming from the April 25th incident. She was never charged with misconduct related to the March 21st incidents.

Ms. Forte sought arbitration over the discharge decision and, on January 20, 21 and 26 and February 9, 12, 17 and 18, 1998, a hearing was held in this discharge. [3-73].

On May 22, 1998, the arbitrator entered her award, upholding the removal. [73].

Ms. Forte appealed the arbitrator's award to the United States Court of Appeals for the Federal Circuit and oral argument was heard on June 7, 1999.

During the oral argument, the panel ascertained from the Counsel for the Agency that the agency had not appealed the findings and conclusions of the Arbitrator. That is, the Court of Appeals established as a threshold matter that the Agency was bound by the Arbitrator's findings and conclusions that the February 21, 1997, incidents were not service connected and that the firing of Ms. Forte would be upheld only upon the matter of her March 21, 1997, inappropriate comments to Sergeant Gray.

On June 9, 1999, the United States Court of Appeals, Federal Circuit, issued its *per curiam* decision and affirmed the arbitrator's award. [1, 2].

B. Basis of Circuit Court's Jurisdiction

The jurisdiction of the United States Court of Appeals for the Federal Circuit was premised upon Title 5, United States Code, Sections 7121, 7512 and 7703 as an appeal of a discharge by the Department of Veterans Affairs.

In accordance with the Master Agreement between the American Federation of Government Employees and the Department of Veterans Affairs, the Petitioner initially appealed her discharge, as an adverse action covered by Title 5, United States Code, Section 7512, to an Arbitrator.

The appeal to the Federal Circuit Court of Appeals was pursuant to Title 5, United States Code, Sections 7121 and 7703.

ARGUMENT

1. The discharge of a black, female Veterans Affairs Medical Center nurse with ten years service, premised upon her private utterance to a black, male Veterans Affairs Medical Center police sergeant that he is an "ass-kissing Uncle Tom nigger" is repugnant to the First Amendment to the Constitution.

That is, the United States Court of Appeals for the Federal Circuit, in affirming the Arbitrator's upholding of the Veterans Affairs Medical Center discharge of Petitioner, has decided an important question of federal law that has not, but should be, settled by This Honorable Court, or has decided an important federal question in a way that conflicts with relevant decisions of This Honorable Court.

In her analysis of the evidence presented by both parties at the arbitration hearing in this matter, the Arbitrator found by a preponderance of the evidence that charges (a), (b) and (c) occurred, but that there was insufficient nexus of the alleged misconduct to her job and, therefore, these charges did not support removal of Ms. Forte. [50-53].

Further, the Arbitrator found that charge (d) was a matter between "two Union representatives who had been, in essence, going at it tooth and nail, if you will, for several months." [56]. Regarding this charge, the arbitrator voiced concern about upholding a discharge action based upon an argument between Union officials regarding Union business and ruled that "removal under these circumstances was not warranted." [57].

Therefore, the Arbitrator upheld the Agency's removal premised upon the finding as to charge (e) and the aggravation value, if any, of charge (d).

That is, the Arbitrator upheld the firing of Ms. Forte because she had said to Police Sergeant Gray, in the privacy of his office, that he was "an ass-kissing Uncle Tom nigger."

This Honorable Court has never addressed a case in which the discharge of an employee was based upon the employee's utterance of the

word "nigger."

Similarly, the Court of Appeals for the Federal Circuit has addressed but one, Henry v. Department of the Navy, 902 F.2d 949 (Fed Cir. 1990).

In Henry, plaintiff government employee of the United States Marine Corps Finance Center, Kansas City, Missouri, had been given a letter of reprimand for having disrespectful conduct in calling her supervisor "a white man's nigger" and for insubordinate behavior for refusing a work assignment.

Then, about two months later, she wrote letters to guest speakers scheduled to address a celebration in honor of Dr. Martin Luther King Jr.'s birthday and made several false accusations against her supervisor as one who appeared to be racist.

When Henry was removed from her job, on the basis of refusal to perform legitimately assigned work and for her unfounded accusations against her supervisor, she appealed the removal.

Henry's firing was upheld on the stated premise of the removal, which did not include comment on her earlier description of her supervisor as "a white man's nigger." That is, her firing was not premised or permitted upon the allegation she'd uttered the term "white man's nigger."

Ironically, the only other occasion in which the Court of Appeals for the Federal Circuit -- or its predecessor the Court of Claims -- has addressed a matter in which the word "nigger" was uttered was Ruffin v. United States, 1959 WL 7571 (Ct.Cl. 1959). In Ruffin, a black male Postal worker appealed to the Court of Claims his removal for having slapped his supervisor who had said to him "you niggers ask too many questions." The supervisor was not disciplined and Ruffin, the slandered employee, was fired for violence in the workplace. The Court of Claims upheld this removal.

Contrary to Henry, Ms. Forte was not fired upon refusal to work or due to insubordination to a superior, and unlike Ruffin, she did not commit violence against the police sergeant. She merely stated to Sergeant Gray, in the privacy of his office, that she considered him an "ass-kissing Uncle Tom nigger." He did not react violently and there is no evidence or even suggestion that he was harmed in some way by the words of the then-fifty-one year old black woman.

2. The pretextual discharge of a Chief Steward of the Union Local at the Veterans Affairs Medical Center, under the false pretense that she was fired for her inappropriate private comments to a fellow employee, is repugnant to the First Amendment to the Constitution.

That is, the United States Court of Appeals for the Federal Circuit, in affirming the Arbitrator's upholding of the Veterans Affairs Medical Center discharge of Petitioner, has decided an important question of federal law that has not, but should be, settled by This Honorable Court, or has decided an important federal question in a way that conflicts with relevant decisions of This Honorable Court.

This Honorable Court has consistently held that "there are innumerable different ways in which a plaintiff seeking to prove intentional discrimination may show that an employer's stated reason is pretextual and not its real reason." Patterson v. McLean Credit Union, 491 U.S. 164, (1989) at page 217.

The Court of Appeals for the Federal Circuit, too, has provided specific guidance in this area.

In determining whether anti-Union animus was present in a removal decision and in determining consistency in penalizing Union and non-Union employees, the Court of Appeals for the Federal Circuit earlier had enumerated four factors at which a court may look, including "(1) the nature of the misconduct; (2) the positions the employees occupied; (3) the employees' past disciplinary records; and (4) the extent to which employees were previously warned that their conduct may result in discipline." [Power v. FLRA, 146 F.3d 995 (D.C. Cir. 1998)].

In the instant case, (1) Ms. Forte's misconduct evolved around her willingness to oppose the administration and its agents; (2) she was a Registered Nurse employed in a special project, while simultaneously serving as the Chief Steward for the Union Local; (3) she had an unblemished record; and (4) she had received no warning about this conduct.

Further, the Arbitrator had found that there was no evidence of consistency by the Agency in dealing with alleged disrespect and insubordination cases. This was, no doubt, due to the fact that the Agency had not previously removed non-Union members for such misconduct.

In her written reply to the proposed discharge, Ms. Forte attempted to address this and point out disparate treatment for such offenses, but the Agency argued that the reply [103-109] could not be considered because it was authored by Abraham Gordon during the period that he was barred from Union activities by Haymon Parker. That Mr. Gordon was subsequently vindicated and elected to the Local Presidency was of no moment to the Agency.

The arbitrator perceptively noted that charges (a), (b), (c) and (d)of the proposed discharge letter all pertained to Ms. Forte's execution of her Union duties or stemmed from her interaction with other Union members. What, perhaps, escaped the arbitrator's gaze was the clear connection between charge (e), as well.

That is, as stated above, charge (e) occurred when Ms. Forte was brought to the police station to undergo questioning about Haymon Parker's accusation that Ms. Forte had threatened him on the telephone. Although Sergeant Gray claimed that Ms. Forte had been escorted to his office for questioning, he further testified that he already had received the bar letter.

In other words, the Agency already had convicted and sentenced Ms. Forte to be banished from the facility even before Sergeant Gray attempted the pretense of interviewing her about the incident.

This being the case, Ms. Forte was not actually compelled to report to the police station for the reasons given by the Agency. Rather, she was taken there merely to receive the bar letter and not to be interviewed. Under these circumstances, does it constitute chargeable disrespect for Ms. Forte, once aware of this ruse, privately to denounce the Agency's policeman as an "ass-kissing, Uncle Tom nigger" and to state her brother's disdain for the force?

Ms. Forte did not offer any violence to the sergeant or other officers, and no one testified that her comments caused them any discomfort.

From a complete reading of the arbitrator's detailed restatement of the evidence, it is clear that Ms. Forte was a zealous advocate for the Local and represented a thorn in the side of the Medical Center administration.

The arbitrator should have concluded from the evidence of record that the Agency used the charges as a pretext to remove Ms. Forte out of

animus for her aggressive pursuit of protected activities. This removal was a violation of Ms. Forte's rights under the First Amendment to the Constitution to belong to the Union Local and to exercise her right to free speech.

3. The discharge of a black, female nurse with ten years federal service for a first offense in which she called a black, male police sergeant co-worker, in private, "an ass-kissing Uncle Tom nigger" is repugnant as cruel and unusual punishment and excessive fines within the Eighth Amendment to the Constitution.

That is, the United States Court of Appeals for the Federal Circuit, in affirming the Arbitrator's upholding of the Veterans Affairs Medical Center discharge of Petitioner, has decided an important question of federal law that has not, but should be, settled by This Honorable Court, or has decided an important federal question in a way that conflicts with relevant decisions of This Honorable Court.

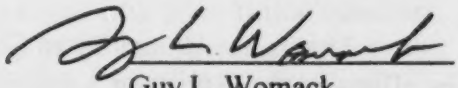
Under the circumstances attendant in this case, the discharge of Ms. Forte constitutes disproportionate punishment for the offense committed.

Ms. Forte, then in her early-fifties, a black female registered nurse with ten years of unblemished service to the Department of Veterans Affairs and with more than twenty years experience in the nursing field, should not have been fired for the one-time, private statement to a fellow employee, himself an experienced police sergeant with many years of service.

RELIEF REQUESTED

WHEREFORE, premises considered, Petitioner, Ms. Forte, prays that This Honorable Court shall grant her petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit and for all appropriate relief.

Very respectfully,



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Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
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FOR THE FEDERAL CIRCUIT

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APPENDIX

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-3269

DOROTHY FORTE,

Petitioner,

V.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Judgment

ON APPEAL from the ARBITRATOR MARETTA C. TOEDT,

in CASE NO(S). FMCS 97-18365-8

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R.36

Per curiam (PLAGER, Circuit Judge; FRIEDMAN, Senior Circuit Judge: and

ENTERED BY
ORDER OF
THE, COURT

DATED JUN 09 1999 Jan Horbaly,
Clerk

FILED

US COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ISSUED AS A MANDATE: AUGUST 2, 1999
COSTS AGAINST PETITIONER

COPIES	$442.96
TOTAL	$442.96

JUNE 091999

JAN **HORBALY**

CLERK

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

Between	)	
	)	
Dorothy Forte	)	
Grievant	)	
	)	
-and-	)	**FMCS No.: 97-**
	)	**18365-8**
Veterans Administration Medical	)	
Center	)	
Agency		

Before Maretta C. Toedt, Arbitrator, mutually selected by the Parties.

APPEARANCES

For the Agency:

Mike Lutz	Advocate
Elizabeth Karpati	Technical Adviser
Michael Watts	Technical Adviser
Michelle Hilkemeier	Observer
Harold Griffin	Observer
Warren Robicheaux	Senior Labor Relations Specialist, Witness
Lance Peet	Police Officer, Witness
Moses Vasquez	Police Officer, Witness
Jacqueline Rencher	Police Officer, Witness
Norma Jean Shaw	Police Officer, Witness
Fred Gray	Detective, Witness
James Jones	Chief of Surgery, Witness
Alma Kelly	Police Officer, Witness
Violet Hartsfield	Nurse, Witness
Larry Hughes	Chief; Human Resources, Witness
Robert Stott	Director, Retired, VA, Witness
Haymon Parker	Retired VA Nursing Assistant, Ex-Local Union President, Witness
Dorothy King	Program Support Assistant, Witness
David Burke	VA Police Chief; Witness

For the Union

Abraham Gordon	Advocate
Myhammad Abdullah	Technical Adviser
Thomas Scillian	Technical Adviser
Helen Martin	Observer
Dorothy Forte	Grievant, Witness
Waymon Cornell	Police Officer, Witness
Lillian White	Retired VA Employees, Witness
Frank Munoz	Police Officer, Witness
Victoria Cottrell	Administrative Officer, Witness
John Fontenot	Director's Staff, Witness
Sandra Ford Caesar	VAMC Environmental Management Service, Witness
Katy Jones	Unit Clerk, Witness
Patricia Jordan	Social Worker, Witness

HEARING

A hearing was held in the above matter on January 20, 21 and 26 and February 9, 12, 17 and 18, 1998 at the Army Reserve Center in Houston, Texas. The witnesses were sworn and were sequestered during the Hearing. The Parties stipulated that the matter was properly before the Arbitrator for final and binding Opinion and Award. Post hearing briefs were to be postmarked no later than March 30, 1998. The Parties were given full opportunity to present testimony and evidence at the Hearing.

On March 3, 1998, the Arbitrator received an ex parte communication dated February 27, 1998 from the Union. The Arbitrator sent a copy of the Union's letter to the Agency on March 4, 1998. The Arbitrator wrote both Parties on March 4, 1998 advising them that ex parte communications with the Arbitrator were prohibited and that any new evidence contained in the Union's February 27, 1998 would not be considered by the Arbitrator. The Arbitrator also extended to the Parties the opportunity to hold a conference call with the Arbitrator to discuss any issue related to the ex parte communication. Neither Party requested a conference call by the March 12, 1998 deadline set by the Arbitrator.

By letter dated March 10, 1998, the Agency requested that the Arbitrator issue sanctions against the Union for its ex parte communication.

The Arbitrator duly considered all of the evidence and declined to issue sanctions. The Arbitrator instructed the Parties to file all copies of their post-hearing briefs with her and she would exchange the briefs.

Post-hearing briefs were postmarked March 30, 1998 and were transmitted to each Party by the Arbitrator. The Hearing was declared closed by certified letter to the Parties dated April 1, 1998.

On April 20, 1998, the Arbitrator received another letter from the Union dated April 16, 1998. This letter included a copy of an FLRA decision with a cover letter from the Union which stated that "As you and the Agency's representative are aware, a decision by either party can be introduced at any stage of the process in order to assist the deciding official." A copy of the FLRA decision had also been sent to the Agency. By fax and letter to the Parties dated April 12, 1998, the Arbitrator gave the Agency the opportunity to elect to respond to the Union's latest submission or to ask the Arbitrator to return the case unread to the Union. A response from the Agency was due by May 1, 1998. The Union withdrew the submission of the case in writing on April 21, 1998. By fax dated May 1, 1998, the Agency requested that the Arbitrator return the documents to the Union unread. The Arbitrator did so on May 1, 1998.

ISSUE

The Parties stipulated to a statement of the issue, which is:
Was the discharge of the Grievant on May 5, 1997 for such cause as would promote the efficiency of the service? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Federation of Government Employees - Effective August 13, 1982

Preamble

Section 1 - This Agreement is made and entered into by and between the Veterans Administration, hereinafter referred to as the Agency or the VA, and the American Federation of Government Employees/National Veterans Administration Council of Veterans Administration Locals, hereinafter referred to as the Union. The Union and the Agency hereinafter will be referred to as the "Parties."

Article 1 - Recognition and Coverage

Section 1 - The AFGE is recognized as the sole and exclusive representative for all non-professional employees, full-time, part-time and temporary, in units consolidated and certified by the FLRA in Certificate No.22-08518 (UC), dated 2/28/80, and any subsequent amendments or certifications that add employees to the bargaining unit.

Section 2 - As the sole and exclusive representative, the Union is entitled to act for and to negotiate agreements covering all employees in the bargaining unit. The Union is responsible for representing the interests of all employees in the bargaining unit without discrimination and without regard to membership in the Union.

Section 3 - The Agency recognizes that, as the exclusive representative of employees in the unit, the Union has the right to speak for and to bargain on behalf of the employees it represents. The Agency will not bypass the Union by entering into any agreement with other employee organizations that constitutes collective bargaining over personnel policies, practices or working conditions.

Article 3- Governing Laws and Regulations

Where any Agency regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

Article 6 - Rights and Responsibilities

A. Agency management shall not impose any restraint, coercion, discrimination or interference against any union representative or employee in the exercise of their rights under the Act.

Section 7 - Union-Employee Communications

Management will not exercise interference, coercion, or censorship of the content of any direct communications between the Union and employees. However, VA facilities will not be available for posting or distribution of vulgar, libelous or defamatory material directed at Agency officials or programs.

Article 9 - Use of Official Facilities

At the request of the Union, the Employer will provide the Union with use of suitable space for meetings during non-duty hours of employees involved when such space is available and within the control of the Employer. The Union agrees to exercise reasonable care in the use of such space.

Article 10 - Employee Rights

A. In an atmosphere of mutual respect, all employees shall be treated fairly and equitably, and without discrimination in all aspects of personnel management, without regard to political affiliation, union activity, race, color, religion, national origin, sex, marital status, age, or non-disqualifying handicapping conditions, and with proper regard and protection of their privacy and constitutional rights. It is therefore agreed that management will endeavor to establish working conditions which will be conducive to enhancing and improving employee morale and efficiency.

1. Instructions and counseling will be given in a reasonable and constructive manner. Every effort will be made to provide such guidance in an atmosphere that will avoid public embarrassment or ridicule. If an employee is to be served with a warrant or subpoena, it will be done in private, without the knowledge of other employees, to the extent it is within management's control.

2. No disciplinary or adverse action will be taken against an employee upon an ill-founded basis, such as unsubstantiated rumors or gossip.

3. No employee will be subjected to intimidation, coercion, harassment, or unreasonable working conditions as reprisal, nor be used as an example to threaten other employees.

4. No unit employee will be subjected to disciplinary and/or adverse action of any type as a result of conflicting orders issued by responsible officials as long as he/she advises the last official of the conflict and follows the latest order. If the employee is aware of any problem which may occur because of this conflict, he/she should bring this to the attention of the immediate supervisor.

Section 2 - Rights to Union Membership

Each employee shall have and shall be protected in the exercise of the right, freely, and without fear of penalty or reprisal, to form, to join, to act as a designated representative and assist the Union. This right shall extend to participation in all union activities, including service as officers and stewards.

Section 9 - Unlawful Orders

Employees have the right to refuse orders that would require the employee to violate the law.

Preamble

Section 1: This Master Agreement is made between the Department of Veterans Affairs ("the Department") and the American Federation of Government Employees National Veterans Affairs Council of Locals (As the Union").

Section 2: The Department and the Union agree that a constructive and cooperative working relationship between labor and management is essential to achieving the Department's mission and to ensuring a quality work environment for all employees. The parties recognize that this relationship must be built on a solid foundation of trust, mutual respect, and a shared responsibility for organization success.

Therefore, the parties agree to work together in partnership and through this Master Agreement to identify problems and craft solutions, enhance productivity, and deliver the best quality of service to the nation's veterans.

Section 1 - Exclusive Representative

AFGE is recognized as the sole and exclusive representative for all of those previously certified nonprofessional and professional employees, full-time, part-time, and temporary, in units consolidated and certified by the Federal Labor Relations Authority (FLRA) in Certificate No.22-08518 (UC), dated February 28, 1980, and any subsequent amendments or certifications. The parties agree that should the Union request the FLRA to include subsequently organized employees in the consolidated unit, such FLRA certification will not be opposed by the Department if the unit would otherwise be considered an appropriate unit under the law. Upon certification of FLRA, such groupings automatically come under this Agreement.

Section 2 - AFGE Role

As the sole and exclusive representative, the Union is entitled to act for and to negotiate agreements covering all employees in the bargaining unit. The Union is responsible for representing the interests of all employees in the bargaining unit.

Section 3 - Employee Representation

A. The Department recognizes that, as the exclusive Representative of employees in the bargaining unit, the Union has the right to speak for and to bargain on behalf of the employees it represents. The Department will not bypass the Union by entering into any formal discussions or agreements with other employee organizations or bargaining unit employees concerning all matters affecting personnel policies, practices, or working conditions.

Article 2- Governing Laws and Regulations

Section 1 - Relationship to Laws and Regulations

In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable Federal statutes. They will also be governed by Government wide regulations in existence at the time this Agreement was approved.

Section 2 - Department Regulations

Where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern.

Article 16 - Employee Rights

Section 10 - Unlawful Orders

An employee has the right to refuse orders that would require the employee to violate the law. This refusal to obey an unlawful order will not subject the employee to disciplinary or

adverse action.

Article 28- Safety, Health, and Environment

A. Management will make reasonable efforts to protect employees from abusive and threatening occurrences and will take reasonable precautions to ensure such protections.

Article 46 - Rights and Responsibilities

Section 7- Union-Employee Communication

The Department will not alter or censor the content of any direct communications between the Union and employees. However, Department facilities will not be available for posting or distribution of libelous or defamatory material directed at Department or Union officials or programs.

The Federal Service Labor-Management Relations Statute
Subchapter I - General Provisions

Section 7102. Employees' rights.

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right ---

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Subchapter II - Rights and Duties of Agencies and Labor Organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

Section 7116. Unfair labor practices.

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency - -

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials and collection of dues) shall be performed during the time the employee is in a non-duty status.

38 CFR Section 1.218

(a) *Authority and rules of conduct* Pursuant to 38 U.S.C. 901, the following rules arid regulations apply at all property under the charge and control of VA (and not under the charge and control of the General Services Administration) and to all persons entering in or on such property. The head of the facility is charged with the responsibility for the enforcement of these rules and regulations and shall cause these rules and regulations to be posted in a conspicuous place on the property.

(5) Disturbances. Conduct on property which creates loud or unusual noise; which unreasonably obstructs the usual use of entrances, foyers, lobbies corridors, offices, elevators, stairways, or parking lots; which otherwise impedes or disrupts the performance of official duties by Government employees; which prevents one from obtaining medical or other services provided on the property in a timely manner; or the use of loud, abusive, or otherwise improper language; or unwarranted loitering, sleeping or assembly is prohibited. In addition to measures designed to secure voluntary terminations of violations of this paragraph the head of the facility or designee may cause the issuance of orders for persons who are creating a disturbance to depart the property. Failure to leave the premises when so ordered constitutes a further disturbance within the meaning of this rule, and the offender is subject to arrest and removal from the premises.

(b) *Schedule of offenses and penalties.* Conduct in violation of these rules and regulations set forth in paragraph (a) of this section subjects an offender to arrest and removal from the premises. Whomever shall be found guilty of violating these rules and

regulations while on any property under the charge and control of the VA is subject to a fine as stated in the schedule set forth herein or, if appropriate, the payment of fixed sum in lieu of appearance (forfeiture of collateral) as may be provided for in rules of the United States District Court. Violations included in the schedule of offenses and penalties may also subject an offender to a term of imprisonment of not more than six months, as may be determined appropriate by a magistrate or judge of the United States District Court:

(11) Disorderly conduct which creates loud, boisterous, and unusual noise, or which obstructs the normal use of entrances, exits, foyers, offices, corridors, elevators, and stairways or which tends to impede or prevent the normal operation of a service or operation of the facility, $250.

(21) Distribution of pamphlets, handbills, and flyers, $25.

Notice of Proposed Discharge Dated April 2, 1997

1. This is to notify you that it is proposed to discharge you from employment with the VA based on the following reasons:

a. On February 21, 1997, at approximately 8:20 a.m., you were approached by Chief David Burke of the VA Police at the main lobby of the medical. center. You were ordered to discontinue passing out flyers announcing an unauthorized meeting in the fourth floor auditorium. You refused to comply with Chief Burke's order and were issued a United States District Court Violation Notice for distribution of flyers in violation of 38 CFR 1.2~8@)(21). Your action of deliberate refusal to carry out a proper order constitutes misconduct.

b. On February 21, 1997, at approximately 8:20 a.m., in the main lobby of the medical center, you were instructed by Officer Lance Peet to accompany him to the police office which you refused to do. When Officer Peete attempted to handcuff you at the time of your arrest, you dropped to the floor swinging your arms which necessitated the assistance of three other officers to restrain you for handcuffing. While being restrained and handcuffed, you attempted to injure two

officers. Your actions resulted in being restrained by four officers, handcuffed and taken into custody. You were issued a U. S. District Court Violation Notice for disorderly conduct in violation of 38 CFR 1.218(b)(11). Your actions constitute attempting to inflict bodily injury to VA police officers.

c. On February 21, 1997, at approximately 8:20 am., when approached by Chief David Burke of the VA police in the main lobby of the medical center, you shouted words to the effect, "You're management, don't fucking touch me," or words to that effect. You also yelled at the officers, "you bastards" when being taken into custody. You were issued a United States District Court Violation Notice for disorderly conduct in violation of 38 CFR 1.218(b)(11). Your actions constitute use of obscene language and disrespectful conduct.

d. On March 21,1997, at approximately 11:50 a.m., you telephoned the President of AFGE Local 1633, Haymon Parker, and stated words to the effect, "who do you thing you are you goddamn mother fucker, going around telling people that I am not handling their cases. You are a dead man, you goddamn motherfucker, do you hear me. You're dead." Your actions constitute use of obscene and abusive language and disrespectful conduct. Furthermore, your statements constitute a threat to inflict bodily injury to another.

e. On March 21, 1997, at approximately 2:15 pm., during a discussion in Room 1A-820C with Sergeant Fred L. Gray of the VA Police, you screamed words to the effect that your brother, who is an officer with the Houston Police Department, said the VA police were, "all nothing but a bunch of keystone cops." You also said Sergeant Gray, "wasn't anything but a Goddamn Uncle Tom-ass nigger." You then attempted to depart Police and Security Service which necessitated your being restrained, handcuffed and placed in a restraining cell. You were issued a United States District Court Violation Notice for disorderly conduct in violation of 38 CFR 1.218(b)(11). Your actions constitute use of obscene and abusive language and disrespectful conduct.

2. You have the right to reply to this notice orally or in writing, or both orally and in writing, and to submit affidavits in support of your reply, showing why the charges are unfounded and any other reasons why your proposed discharge should not be effected. You will be given until the close of business 14 calendar days from the day you receive this notice to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted through me to the Director. The Director will receive your oral reply, or will designate an official or officials to receive it. If you do not understand the above reasons why your discharge is proposed, contact me or the Labor-Management Relations Section of the Human Resources Management Service, extension 7763, for a further explanation.

3. The evidence on which this proposed action is based will be available for your review in the Human Resources Management Service. If otherwise in an active duty status, you will be allowed 8 hours of official duty time for reviewing the evidence relied upon to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

4. The final decision to effect the action proposed has not been made. In making the final decision, the Director will give full and impartial consideration to your reply, if a reply is submitted.

5. If it is the decision of the Director that you be discharged, your discharge will be effective not less than 30 calendar days from the day after you receive this notice. You will be given a written decision within 21 days of the receipt of your reply, or of the close of business 14 calendar days from the day you receive this notice, if you do not reply.

6. You will be retained in a paid non-duty status during the advance notice period.

7. You have the right to representation by any individual of your choice, subject to agency disallowance. However, if you are a

bargaining unit employee, you have the right to representation by AFGE, Local 1633 or any individual of your choice, designated in writing by AFGE, Local 1633, to serve as their representative. The designation of any representative must be made in writing. You and your representative, if you have one, are assured of freedom from restraint, interference, coercion, discrimination, and reprisal in presenting your case.

POSITION OF THE EMPLOYER

At approximately 8:00 a.m. on February 21, 1997, the Grievant was observed distributing flyers in the main lobby of the medical center by Mr. Warren Robicheaux ("Robicheaux"). The flyers announced a meeting that was to be held in the fourth floor auditorium at noon that day. After determining that the auditorium was already fully booked for that time period by the Medical Service, Robicheaux approached the Grievant in the main lobby and asked her to cease and desist passing out the flyers. Robicheaux was concerned about the potential disruption that would occur when both groups - union members and medical staff- attempted to use the auditorium at the same time.

The Grievant refused to stop distributing the flyers and began shouting at Robicheaux that she had every right to pass out the flyers. Despite being asked to stop repeatedly by Robicheaux, the Grievant continued to shout that she had every right to pass out the flyers and that Robicheaux had no right to stop her. Robicheaux warned the Grievant that if she did not stop distributing the flyers and yelling and shouting he would have to call security. The Grievant responded that she would only stop if she was handcuffed and carried away.

Robicheaux located Chief Burke, explained the situation to him and directed him to the Grievant's location in the main lobby. Although Chief Burke identified himself and instructed the Grievant to stop distributing the flyers, the Grievant refused to comply and instead became boisterous and belligerent and shouted "You're management, don't fucking touch me," or words to that effect. Chief Burke called for back up and was assisted by Officers Peet, Shaw,

Vasquez and Rencher. Officer Peet pleaded with the Grievant to stop distributing the flyers and to come peacefully with him to the police office but the Grievant refused to cooperate. Finally, Officer Peet was forced to attempt to handcuff the Grievant. In this process, the Grievant dropped to the floor kicking her legs and swinging her arms. As a result of the Grievant's kicking and thrashing, Officer Vasquez was kicked on his left hand and forearm and Officer Rencher was kicked and bruised on her upper left arm. The incident caused the VA police to issue three United States District Court Violation Notices. The incident also was the basis for charges (a) through (c) in the proposed notice of discharge. The Grievant deliberately refused to carry out a proper order, attempted to inflict bodily injury to others and used obscene and abusive language.

On March 21, 199), the Grievant, while on active duty status, telephoned Mr. Haymon Parker, President~of AFGE Local #1633 and threatened him. The Grievant stated to Mr. Parker, "who do you think you are, you goddamn motherfucker, going around telling people that I am not handling their cases. You are a dead man, you goddamn motherfucker, do you hear me. You're dead." Mr. Parker recognized the Grievant's voice and immediately reported the incident to Larry Hughes in Human Resources who then reported it to the VA police. The Grievant was escorted to the police office for questioning but refused to cooperate with the investigation. Instead, the

The Grievant asserted her *Weingarten* rights and was not questioned further. The Grievant was then presented with a bar letter. The Grievant was instructed to wait for her sister to bring her personal effects. Instead, the Grievant ran toward the door leading back into the VA and attempted to flee. The door was locked, preventing the Grievant from leaving. The Grievant was then restrained, handcuffed and placed in a holding cell.

The Grievant was issued a United States District Court Violation Notice for disorderly conduct. The Grievant's conduct formed the basis of charges (d) and (e) in the proposed notice of discharge. The Grievant threatened to inflict bodily injury to another and used obscene and abusive language and exhibited disrespectful

conduct.

The Agency's Burden of Proof

The Grievant's discharge is a major adverse action as defined by MP-5, Part II, Chapter 8 and the Master Agreement between the Parties. Section 8.09 states that the "Department bears the burden of proving by a preponderance of evidence the charges that form the basis for the action." Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact is more likely true than untrue. ~ C.F.R. Section 1201.56(c)(2).

Charge (a)
Deliberate Refusal to Carry Out a Proper Order
Chief Burke Issued a Proper Order

Charge (a) in the proposed notice of discharge charges the Grievant with refusal to carry out a proper order. The Grievant refused to carry out Chief Burke's proper order that the Grievant cease and desist in the distribution of the flyers. The Grievant was instructed repeatedly by Robicheaux to cease distributing the flyers. Chief Burke made several attempts to get the Grievant to come to his office to seek the necessary approvals to distribute the flyers but the Grievant refused. Not only did the Grievant refuse to comply; the Grievant escalated the dispute by becoming louder and more belligerent in her refusals. The Grievant shouted that she would only go "in handcuffs kicking and. screaming."

Chief Burke is a law enforcement official. His order to the Grievant to cease and desist distribution of the flyers and to come to his office to obtain the necessary approvals was based on his knowledge of 38 CFR ' 1.218 and was a proper order. The Grievant, although functioning in a Union capacity, was required to obtain prior approval pursuant to 38 CFR ' 1.218(a)(9) from the head of the facility, Mr. Stott, in order to distribute material on February 21, 1997. The Grievant never obtained this approval. Chief Burke stated that he believed the Union was familiar with the requirement to get prior

approval to distribute flyers as the Union had asked Chief Burke on at least two occasions to enforce the prior approval regulation. Chief Burke further testified that the year before during an election the Union made a formal request to distribute flyers near the polling place. Finally, Chief Burke testified that there have been nine charges against individuals who were distributing flyers relating to pagers, weight loss, insurance, and so on. This evidence demonstrates that the Agency has consistently applied and enforced the prior approval requirement of 38 CFR ' 1.218(a)(9).

The Union has argued that 38 CFR ' 1.218 does not apply to the Grievant because Article 2, Section 2 of the 1997 Master Agreement states that "where any Department regulation conflicts with this Agreement and/or a Supplemental Agreement, the Agreement shall govern." The Union has failed to indicate where such a conflict exists between the CFR and the .1997 Master Agreement, Section 1.218 does apply to the Grievant and there is no conflict between that section and the 1997 Master Agreement.

Chief Burke's order was also proper and in conformance with Chapter 711, Section (G)(1)(c) of the Agency's regulation on Labor-Management Relations, MP-5. This section states that:

VA management officials may negotiate or reach an understanding with representatives of the labor organizations as to the content and size of material and will place responsibility for adherence to such understanding upon the labor organizations. This could include provision for prior approval by management of material proposed for posting or distribution on VA premises.

The Union and the Agency had an understanding that prior approval was required for distribution of literature. The fact that previous Union officials requested prior approval for distribution of literature reflects such an understanding. Officer Cornell and Dorothy King, both union members, testified that they were aware of the prior approval requirement. Therefore, Chief Burke's order was proper based on the language of 38 CRF 1.218.

The Agency's primary concern was for the potential disruption that would occur at noon on February 21, 1997 when the Grievant and other Union members attempted to use an auditorium that was already booked. The Grievant admitted that she had not reserved the auditorium. The Agency's responsibility to provide meeting space for the Union is described in the MR-5, Chapter 711, Section (G)(2)(b) and the 1982 Master Agreement, Article 9, Section 2.

Chapter 711, Section (G)(2)(b) states that:

Subject to safety and security regulations and where facilities for holding meetings of labor organizations are available on VA premises, labor organizations may negotiate or be granted permission to use such facilities for business and membership meetings outside the regularly scheduled working hours of the employees involved, provided such action will not interfere with proper functioning of VA activities.

Article 9, Section 2 of the 1982 Master Agreement states that:

At the request of the Union, the Employer will provide the Union with use of suitable space for meetings during non-duty hours of employees involved when such space is available and within the control of the Employer. The Union agrees to exercise reasonable care in the use of such space.

The language in the 1982 Master Agreement and the MP-5 clearly indicate that the Union must first initiate a request for space. The Agency is only required to provide such space when it is available and under its control. The Union failed to comply with the clear policy as expressed in the MP-5 and the 1982 Master Agreement when it failed to obtain prior approval for meeting space. Although Dorothy King testified that she had received requests from the Union for meeting space, the Grievant acknowledged that she had not made such a request. In fact, the Grievant believed that she could use any room within the medical center and hold a meeting if no one was using the space. This is exactly what the Grievant attempted to do on February

21, 1997. Even after the early morning incident in the lobby of the medical center, the Grievant still showed up at noon to hold a meeting in the auditorium when a previous meeting had been scheduled for that space.

The Grievant's actions interfered with the proper function of VA activities.

The MP-5, which is a negotiated agreement at the national level between the parties, and the Master Agreement, contain provisions for obtaining meeting space. These negotiated provisions are intended to prevent chaos and ensure the smooth running of VA activities. The Grievant's actions were exactly the type of behavior that these negotiated provisions were designed to prevent.

The Union has argued that the FLRA decision (Case No. DA-CO-60756) dated January 31, 1997 applies to the instant situation. The FLRA decision is not relevant in this case. That decision involved the Grievant's actions on June 7, 1996. The FLRA ruled that the Grievant could distribute materials in non-work areas during non-work time and in work areas, absent any disruption of the Agency's operations. The FLRA decision involved whether or not the Agency had violated Sections 71 1 6(b)(8) and 7131(b) of the Federal Labor Relations Statute. In the instant dispute, the Arbitrator must decide whether the Grievant's discharge was for such cause as would promote the efficiency of the service. The reason the Grievant was asked to cease and desist in the distribution of the flyers was due to Robicheaux's concerns for a potential disruption in the fourth floor auditorium at noon that day. Robicheaux was not questioning the Grievant' s right to distribute flyers under the statute.

During the Hearing, the Grievant alleged that Chief Burke and Robicheaux conspired against her by calling each other the night before and planning the incident in the lobby the next morning. The Grievant made other allegations of conspiracy along the same lines. There was no evidence, other than the Grievant's speculation, that any conspiracy occurred to orchestrate the Grievant's arrest in the lobby on February 21, 1997.

Finally, the Union has argued that the order was not proper as the Federal Magistrate who ruled on the Grievant's criminal charges in December 1997 found that the Grievant did have a right to distribute literature in the lobby on February 21, 1997. The Federal Magistrate's comments on the lawfulness of the Grievant's distribution of flyers on that date were dicta and should not be binding on the Agency.

The orders given by Chief Burke on February 21, 1997 were proper. These orders were based on Chief Burke's familiarity with the prior approval requirements of 38 CFR ' 1.218. This section has been consistently applied. The Grievant deliberately refused to cease and desist in the distribution of the flyers and to accompany Chief Burke to the police office to obtain approval for the distribution.

Charge (b)
Attempt to Inflict Bodily Injury

Charge (b) specifies that the Grievant's actions constituted attempting to inflict bodily injury to VA police officers. As a result of the scuffle that occurred when the Grievant refused to comply with Chief Burke's proper order, the Grievant injured Officers Rencher and Vasquez. The Grievant was convicted of the actual assault of the two officers in December 1997.

Charge (c)
Use of Obscene Language

Chief Burke testified that on February 21, 1997, the Grievant shouted "You're management, don't fucking touch me." Ms. Isiminger's statement indicates that she heard the Grievant shout "you bastards" as the officers were attempting to escort the Grievant from the lobby area. Although some of the witnesses could not recall the exact language used, the testimony of those witnesses supported the Agency's contention that the Grievant used obscene language on the morning of February 21, 1997. Even the Grievant acknowledged that she uses such language when she is upset or when she feels the

situation warrants it.

The Agency believes that it is more likely true than untrue that the Grievant used obscene language during the incident on February 21, 1997.

Charge (d)
Threatening Statements

Haymon Parker's written statements and testimony at the Hearing establish that he was threatened by the Grievant on March 21, 1997. Parker was in his office with Violet Mansfield when he received a phone call. Upon answering the phone, Parker heard the Grievant shout at him "Who do you think you are you goddamn mother fucker going around telling people that I am not handling their cases. You are a dead man, you goddamn motherfucker, do you hear me. You're dead." Violet Mansfield, Larry Hughes and Chief Burke all testified that Parker was visibly shaken after receiving this phone call. Parker immediately reported the threat to Larry Hughes and then to the VA police. Parker requested protection from the Grievant and the VA police installed a surveillance camera outside his office and escorted him to his car that afternoon.

Violet Mansfield's testimony should be given serious weight by the Arbitrator. Although Mansfield was present in Parker's office when the Grievant's threatening phone call was received, Mansfield did not hear the threatening statements therefore she was not interviewed by the Agency. Days prior to the Hearing, however, Mansfield voluntarily contacted the Agency and advised it that she had called the Grievant at some point after March 21, 1997 and that the Grievant had admitted making the phone call to Parker. Had Hartsfield reported this evidence prior to the notice of proposed discharge, her statement would have been included in the evidence file. However, Mansfield testified that she did not want to volunteer information to the Agency that could be used against fellow Union members therefore she did not initially volunteer this information. The Agency did not act negligently or inappropriately in failing to initially obtain Hartsfield's statement.

The Grievant testified that it was possible that she called Parker on March 21, 1997 and she further admitted being upset with him on that date. The Grievant admitted using the word "fuck" frequently when she was upset and having called Parker a "fat fucker."

Based on the Grievant's testimony and the testimony of Parker and Mansfield, it is more likely true than untrue that the Grievant did telephone Parker on March21, 1997, threatened his life and used obscene language.

In determining what constitutes a threat, the Agency has met the five factors which are outlined in *Metz* V. *Department of the Treasury,* 780 F.2d 1001 (Fed.Cir. 1986). The *Metz* opinion establishes the reasonable person standard and lists five criteria that must be met in order to sustain a charge of threatening conduct. The five factors are: (1) the listener's reactions; (2) the listener's apprehension; (3) the speaker's intent; (4) any conditional nature of the statements; and (5) the attendant circumstances.

1. The Listener's Reactions. Parker testified that the telephone call shook him up. Hartsfield, Hughes and Burke all testified that Parker appeared to be visibly shaken and that this was not his usual demeanor. Parker immediately contacted Hughes who advised him to document the threat in writing. Parker did so. Parker then reported the incident to the VA police and also to the HPD. Parker'>s actions after receiving the telephone call support his contention that the threat upset him and that he took it seriously.

2. The Listener's Apprehension of Harm. Parker testified that he feared he would be harmed and that he was concerned for his personal well-being. Parker stated that "he went into shock" and was unable to speak after receiving the call. Parker stated in his write up that he regarded the call as a death threat. Parker requested protection from the VA police and was provided with a surveillance camera outside his office and was escorted to his car that afternoon. The (Grievant was also barred from the facility as an additional measure of protection.

3. The Speaker's Intent. The Grievant shouted at Parker over the phone and used aggressive and threatening language. The Grievant told Parker he was a dead man. The intent of the Grievant to physically harm Parker was clear. Parker believed he could be murdered following the incident.

4. Any Conditional Nature of the Statements. The Grievant's statements were not conditioned on any other event or circumstance. The Grievant plainly stated that Parker was a dead man

5. The Attendant Circumstances. Parker dismissed the Grievant as a Union Chief Steward two days before she made the threats. The threats were made in response to Parker having informed others that the Grievant was no longer handling their cases, The Grievant was motivated by her removal as Chief Steward to threaten Parker.

The Union has alleged on the Grievant's behalf that Parker fabricated these statements as part of a racial conspiracy to remove the Grievant from the Union and the VA, and in retaliation for the Grievant's denial of Parker's sexual advances. There is no evidence in the record to support a racial conspiracy theory. The Grievant filed an EEO complaint with the Agency on June 6, 1997 and another similar complaint with the Union. Victoria Cottrell, Agency EEO counselor, investigated this charge and her testimony reflected no impropriety on the part of Parker. The Union investigation dated December 12, 1997 recommended that a zone of separation be instituted for the Grievant and Parker.

A reasonable person would conclude that a valid threat was made by the Grievant to Parker on March 21, 1997 and that the *Metz* factors have been established. It is more likely true than not true that the Grievant used abusive and obscene language and threatened Parker's life on March 21, 1997.

Charge (e)

Use of Obscene and Abusive Language and Disrespectful Conduct

This charge stems from the Grievant's conduct and actions toward Sergeant Gray on March 21, 1997. The Grievant admitted that she screamed at Gray that her brother, an HPD officer, said that the VA police were "all nothing but a bunch of keystone cops. The Grievant also told Gray that he "wasn't anything but a goddamn Uncle Tom-ass nigger." Sergeant Gray did not react to this tirade and maintained a professional demeanor. It is more likely true than not true that the Grievant engaged in this misconduct.

Appropriateness of the Penalty

Once it has been established that it is more likely true than not true that the charges have been supported by a preponderance of the evidence, the Agency then determines the appropriate penalty for the misconduct based on the Table of Penalties in the MP-5, Part II, Chapter 8, Appendix SA. The instructions for the use of the Table indicate on page 8A-1 that:

Disciplinary penalties will generally fall between the ranges indicated in the guide, but in unusual circumstances greater or lesser penalties may be imposed. In determining action to be taken in a specific case, mitigating and aggravating factors should be considered such as length of service, past employment record, the potential for improved behavior, etc.

The mitigating and aggravating factors that the Agency must consider are also known as the Douglas Factors.

Douglas Factor Analysis

The Director testified that he specifically considered the Douglas Factors in his decision to discharge the Grievant. The Director considered the severity of the incidents, the appearance of

lack of rehabilitation on the part of the Grievant, the visibility of the incidents and the message that would be sent to other staff if the Grievant were not disciplined. The following is a summary of the Director's consideration of the Douglas Factors.

1. The nature and seriousness of the offenses and their relation to the employee's duties. Position and responsibilities. including whether the offenses were intentional or technical and inadvertent or were committed maliciously or for train. or were frequently repeated.

The Grievant's actions were intentional. Attempting to assault VA police officers and threatening to kill Parker were malicious and very serious in nature. The Grievant's actions were in direct contradiction to her position as a staff nurse.

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

The Grievant is a registered nurse and performed quality assessment duties. This job required minimal supervision and therefore the Agency required a high degree of trust. For this reason, it was incumbent upon the Grievant to conduct herself in a professional manner.

3. The employee's past disciplinary record.

The Grievant did not have any formal disciplinary actions taken against her. The Director testified that the written counseling referred to was not considered in the analysis, as it was not a formal disciplinary action.

4. The employee's vast work record including length of service performance on the job, ability to get along with fellow workers and dependability.

The Grievant had been a registered nurse for approximately seven years and had a satisfactory performance record. There was no testimony regarding her ability to get along with fellow workers.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisory confidence in the employee's ability to perform assigned duties.

Violent behavior by a VA employee is contradictory to the Agency's mission of caring for patients. The injury to two VA police officers, the threats to Parker and the use of obscenity by the Grievant undermined her supervisor's confidence in the Grievant's ability to perform her assigned duties. This in turn negatively affects efficient service to veteran patients.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

The Agency's action to discharge the Grievant was consistent with other incidents of similar misconduct. The Director testified as to the Agency's zero-tolerance policy towards violence and that the removal penalty has been consistently and historically applied to other employees who were similarly situated.

The Union unsuccessfully attempted to show through the testimony of Ms. Sandra Ford Caesar and Ms. Katie Jones that the Agency had been inconsistent in its handling of misconduct similar to that of the Grievant's. The evidence showed that Ms. Jones' husband was removed and barred from the premises for similar misconduct. The Union failed to provide any documentation or evidence that would have shown that these cases were similar to the Grievant's.

7. Consistency of the penalty with any applicable agency table of penalties.

The Agency's imposition of the discharge penalty on the Grievant was consistent with the table of penalties. The table permits discharge as the maximum penalty for attempting to inflict bodily

injury to another, threatening to inflict bodily injury to another, disrespectful conduct and use of obscene language.

8. The notoriety of the offense or its impact upon the reputation of the agency.

The Grievant's conduct occurred in a public area in full view of patients, visitors and other employees. The Grievant's status as a Union officer increased the notoriety of the offense. The Grievant's violent behavior caused embarrassment to the Agency. The Grievant's actions were contrary to the Agency's mission of caring for veteran patients.

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense or had been warned about the conduct in question.

On January 28, 1997, the Grievant received. a written counseling regarding her disrespectful conduct and use of obscene language. The Grievant was also verbally warned on several occasions by Human Resources staff and VA police on February 21 and March 21, 1997. The Grievant was also aware of the Agency's very clear policy on Violence in the Workplace and that misconduct of this nature could lead to discharge.

10. Potential for employee's rehabilitation.

The 'Grievant's removal was based on several incidents of serious misconduct. The misconduct alone raises questions as to whether the Grievant could be rehabilitated. However, an incident that occurred on April 25, 1997 further confirmed that the Grievant could not be successfully rehabilitated. On that date, the Grievant violated the conditions of her bar letter by entering the VA premises without notifying the VA police in advance of her visit. The Deputy Secretary of Veterans Affairs, Mr. Hershel Gober, was visiting the facility that day and the Grievant's presence in the lobby and approaching Mr. Gober necessitated her arrest. Although the Grievant claimed in federal court that she was visiting the facility in order to sign her final

EEO interview, the Grievant admitted at the arbitration hearing that she only assumed the reason for her visit was to sign the notice of final interview. The Director testified that although this incident was not included as a charge in the proposed notice of discharge, it was considered as a factor in determining the appropriate penalty. The Grievant's continued disruptive behavior on that date further demonstrated that she had limited potential for rehabilitation. Based on this evidence, it is more likely true than not true that the Grievant knowingly violated the provisions of her bar letter by attempting to approach Deputy Secretary Gober on April 25, 1997.

11. Mitigating circumstances surrounding the offense such as unusual job tensions. Personality problems. mental impairment. harassment. or bad faith malice or provocation on the part of others involved in the matter.

The Grievant failed to produce any evidence of mitigating circumstances. There was no malice or bad faith on the part of the Agency. The Agency provided evidence to show that the Grievant's actions were unprovoked.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The removal action was necessary in order to ensure that all employees are aware that such conduct is unacceptable. In addition, the combination of five charges against the Grievant warranted such action. The instructions for applying the Agency's table of penalties state on page 8A- 1 that:

(2) Combination of Offenses. When an employee has committed a combination or series of offenses, a greater penalty than is listed for a single offense may be appropriate.

The instructions also state that:

(5) Discharge action will be taken whenever required by law or regulation or whenever warranted by the facts in the individual

case. Usually progressively more severe penalties will be administered before discharge action is initiated, unless the offense is so serious that it warrants discharge action.

The Agency requests that the grievance be denied and that the removal of the Grievant be upheld.

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

The Agency Committed a Harmful Procedural Error

The Agency committed a harmful procedural error when it discharged the Grievant on May 9, 1997. The harmful procedural error is based on the following circumstances and factors:

1. The Grievant was involved in internal Union affairs when she was distributing flyers on the morning of February 21, 1997. The Grievant was in a non-duty status and in a non-work area. The flyers concerned internal Union business. The Agency conspired with Parker to get rid of the Grievant in violation of ' 7116(3) of the Act. Parker was in office illegally and the Agency unlawfully assisted Parker and interfered with the Grievant's lawful and protected activities. The Grievant was unjustifiably harassed, arrested, jailed, issued citations, tried and convicted as a result of the Agency's involvement in internal Union affairs. The Grievant was the only employee ever to be arrested for this type of activity.

2. The Grievant had authority to distribute the flyers. The January 31, 1997 FLRA decision, Case No. DA-CO-60756, supports the Grievant's right to distribute flyers in non-work areas while in a non-duty status and in work areas absent any disruption of the Agency's operations. Furthermore, section 7102 of the Federal Service Labor - Management Relations Statute gives employees the right to "form, join or assist any labor organization...." This section guarantees to the Grievant the right to engage in this activity.

3. The Grievant did not need the permission of the VAMC Director or the Union President to distribute the flyers. The FLRA decision of January 3 1, 1997 supports the Grievant's right to distribute the flyers without prior approval, as does the federal judge's decision of December 30, 1997. The federal court found that any restriction on such distribution was presumptively an unfair labor practice. In addition, the federal court found that the VA could not impose a prior approval requirement against solicitation and distribution rules based on parallel NLRB awards and various provisions in the 1982 Master Agreement. Article 6, Section 1(a) provides that the Agency will not impose any restraint, discrimination or interference against any union representative in the exercise of their rights under the Act. Article 6, Section 7 provides that the Agency will not exercise interference, coercion or censorship with the content of any direct communications between the Union and employees. Article 3, Section 2 provides that the Agreement shall govern if there is any conflict between a regulation and the Agreement. Therefore, under Article 3, Section 2, the Grievant was authorized to distribute Union materials in the lobby of the VA Hospital on non-working time without regard to the prior approval requirement of 38 C.F.R. section 1.218(9).

4. The Grievant was a victim of an unlawful order. Article 16, section 16 of the 1997 Agreement states that employees have "the right to refuse orders that would require the employee to violate the law. This refusal to obey an unlawful order will not subject the employee to disciplinary or adverse action." This same language is also found in Article 10, section 9 of the 1982 Master Agreement. The federal court found that Robicheaux did not have the right to ask the Grievant to stop distributing flyers. Chief Burke did not have the right to ask the Grievant to stop distributing flyers. Therefore, the Grievant was a victim of an unlawful order.

5. The Director failed to consider the Grievant's reply dated April 11, 1997, written by Abraham Gordon. This is a clear violation of the statute.

Charges (a), (b), and (e) are the result of the Agency's harmful error. The Grievant was engaged in protected activity. She was not

discharged for professional conduct or anything related to patient care.

The Grievant did not intend to injure any officer. Officer Rencher testified that she did not believe that the Grievant intended to injure her. Officer Rencher also stated that she bruised easily and that she could have received the bruises as a result of four officers being involved in the attempt to restrain the Grievant.

Charge (d) was not substantiated by Parker and was denied by the Grievant. Parker testified that he was not afraid of the Grievant, but he was afraid of the Grievant's friends. Parker also testified that he believed the incident had gotten out of hand and was handled wrong.

Charge (e) was also unsubstantiated and unsupported. Sergeant Gray testified that the Grievant's remarks did not bother him and that he did not think anything about them.

No Nexus

The Grievant's discharge is not supportable because there is no nexus between the conduct complained of and the Grievant's work performance or patient care duties. Robicheaux was not the Grievant's supervisor. The Grievant was acting as a Union representative, in a non-duty status. Robicheaux had no right to insist that the Grievant stop distributing the flyers. The Grievant's conduct had nothing to do with her ability to perform her job as a nurse. The Grievant's language arose impulsively and in the course of her actions as a Union representative, not as a nurse.

The Douglas Factors

The Director testified that he considered the incident of April 25, 1997 in his decision regarding whether the Grievant could be rehabilitated. The evidence showed that the Grievant did call the VA police on April 25, 1997 to inform them that she was coming onto the premises. The Grievant did not violate the conditions of her bar letter.

The Agency has not met its burden of showing by a preponderance of the evidence that the Grievant committed the offenses with which she is charged. The Grievant was engaged in protected activity. The Agency was unlawfully involved in internal Union affairs. The Grievant should not have been discharged. The Union requests that the grievance be sustained and seeks the following relief:

1. Rescind the unjustified removal and make the Grievant whole;

2. Rescind the tickets issued to the Grievant;

3. Compensate the Grievant for all expenses incurred because of her unjust removal, including court costs and legal fees;

4. Cease interfering in Union internal affairs and punishing Union Stewards for protected activities;

5. A written apology from the Director, VAMC, James W, Jones, M.D., Larry Hughes, Chief; Ruman Resource Management Service and David Burke, Chief VA Police Service;

6. Cease using Police Service employees to interfere in Union internal affairs in violation of Section 7116 and Chapter *752.*

DISCUSSION AND OPINION

The weight of the evidence indicates:

Background

The February 21, 1997 Incident

The Grievant is a Registered Nurse and had been employed by the Houston VA Medical Center from January 1991 until her removal on May 9, 1997. At the time of the incidents that gave rise to the instant dispute, the Grievant worked in the VA Surgical Services Department as a Nurse Reviewer and was responsible for coordinating

data for a national risk assessment study and a national cardiac study.

The Grievant worked largely unsupervised.

The Grievant was also a Chief Steward for the professional employees represented by AFUE Local 1633. Since 1980, Local 1633 has represented the nonprofessional employees at the VA Medical Center. Sometime in 1995 or 1996, the Federal Labor Relations Authority (FLRA) certified Local 1633 as the representative of the professional employees. When Local 1633 President Oletha Evans left office in December of 1996, no one occupied the position of Executive Vice President. The Union Constitution and By Laws dictated that the Office of President be assumed by the Executive Vice President and that an election would be held to name a new Executive Vice President. In the absence of an Executive Vice President, Oletha Evans appointed Haymon Parker, first vice president of the nonprofessionals, to replace her. The Grievant and some others in the Union believed that the appointment of Haymon Parker was contrary to the provisions in the Union Constitution. Dissension over this and possibly other issues continued between Union members. On February 14, 1997, Haymon Parker fired Abraham Gordon as a Union representative. Upon learning of this, the Grievant became enraged and thereupon began to wage a battle within the Union to oust Parker from office and reinstate Gordon to his position.

On the morning of February 21, 1997, at approximately 8:00 a.m., Warren Robicheaux, ("Robicheaux"), Senior Labor Relations Specialist, was approached by Phyllis Isiminger, another VA employee, while on his way to his office. Ms. Isiminger asked Robicheaux if he had seen a particular flyer that was being distributed in the medical center. The flyer read as follows:

ATTENTION AFGE MEMBERS

IN VIEW OF THE CRITICAL CIRCUMSTANCES OF YOUR UNION REPRESENTATIVE, MR. ABRAHAM GORDON HAVING BEEN ILLEGALLY FIRED ON FEBRUARY 20, 1997, BY MR. HAYMON PARKER, WE ARE REQUESTING A

SPECIAL CALLED MEETING OF AFGE MEMBERS SO THAT THEY CAN EXERCISE THEIR RIGHT TO VOTE. PLEASE ATTEND A SPECIAL CALLED MEETING TODAY, FRIDAY, FEBRUARY 21 12:00 NOON MAIN AUDITORIUM FOURTH FLOOR. THESE ACTIONS TAKEN BY. MR. PARKER CAN SERIOUSLY DAMAGE YOUR UNION ACTIVITIES AND YOUR RIGHTS TO DUE PROCESS.

After determining that the fourth floor auditorium had not been reserved by AFGE Local 1633 and instead had been reserved by the Medical Service, Robicheaux asked Ms. Isiminger to accompany him to the main lobby of the hospital to investigate further.

At approximately 8:15 a.m., Robicheaux and Ms. Isiminger arrived in the lobby and observed the Grievant distributing flyers to a group of 3 or 4 individuals. Robicheaux approached the Grievant and asked to see a copy of the flyer. After reading the flyer, which is quoted above, Robicheaux asked the Grievant if he could speak with her privately. The Grievant initially ignored this request but then stepped aside to talk with Robicheaux. Robicheaux asked the Grievant if she was distributing the flyer as Chief Steward and the Grievant responded that she was. Robicheaux pointed out to the Grievant that the flyer was not signed by anyone nor was it on AFUE Local 1633 letterhead. The Grievant responded that she had every right to distribute the flyer. Robicheaux then asked the Grievant about her duty status and the Grievant responded in a loud voice that she was on approved leave. Robicheaux then instructed the Grievant to immediately cease and desist in the distribution of the union flyer, to stop yelling and to retrieve the flyers that she had passed out. The Grievant continued to loudly protest that she had a statutory right to distribute the flyers and Robicheaux continued to instruct the Grievant to stop passing out the flyers and to stop yelling. Robicheaux then advised the Grievant that if she refused to cease and desist in the distribution of the flyers and causing a disruptive situation in the lobby that he would be forced to notify the VA Police and Security Service. The Grievant shouted loudly that Robicheaux would have to call the police because that would be the only way that she was going to stop was if she was handcuffed and carried away. Robicheaux again

repeated his warning that he would be forced to go to the Police if the Grievant did not stop. When the Grievant did not cease and desist in the distribution of the flyers, Robicheanx rushed off to find David Burke, Chief of Police for the VA Police and Security Service.

Upon finding Chief Burke and informing him of the situation in the lobby, Robicheaux and Chief Burke proceeded to the lobby. Robicheaux told Chief Burke that the Grievant was distributing a Union bulletin and was creating a disruptive situation.

Chief Burke approached the Grievant, identified himself; showed his badge and advised the Grievant that she was illegally distributing materials without proper authorization. The Grievant continued to protest loudly that she had a statutory right to distribute the flyers and that she had every right to communicate with Union members. This conversation went back and forth for a short time while a small crowd gathered.

Chief Burke advised the Grievant that if she did not cease the distribution of the flyers that she would be escorted off the premises. The Grievant shouted that she did not care who he was and that she had every right to be there and that Chief Burke would have to handcuff her and drag her out. The Grievant shouted to Chief Burke "You're management, don't fucking touch me."

Chief Burke called for back up assistance and the first officer to arrive was Officer Lance Peet. Officer Peet was instructed by Chief Burke to escort the Grievant off the premises. Officer Peet, who knew the Grievant, tried to calm the Grievant by repeatedly asking for her cooperation and asking her to follow police instructions. The Grievant was not to be mollified. After some futile efforts by Officer Peet to solicit the Grievant's voluntary cooperation, Officer Peet tried to reach for the Grievant's upper arm whereupon the Grievant dropped to the floor. The Grievant began kicking and screaming. Officer Peet instructed the other back up officers (Vasquez, Rencher and Shaw) who had arrived on the scene to assist him. Two of the officers tried to control the Grievant's legs while the other two officers tried to control the Grievant's hands so that she could be handcuffed. The

Grievant was eventually handcuffed and escorted to the police office. In the melee, Officer Rencher got kicked in the shoulder and Officer Vasquez got kicked on the left hand/forearm area.

At the police office, the Grievant was issued citations for disorderly conduct, simple assault and distribution of pamphlets in violation of 38 C.F.R Section 1.21 8(b)(2 1). The Grievant was then released.

The March 21, 1997 Incident

On March 19, 1997, Haymon Parker relieved the Grievant of her duties as Chief Steward. Parker stated that on March21, 1997 he was in his office with Violet Hartsfield going over her new duties as Chief Steward over the professionals when he received a threatening phone call. Parker testified that he recognized the voice as that of the Grievant. According to Parker, the Grievant threatened him by stating:

"Who do you think you are you goddamn motherfucker going around telling people that I am not handling their cases. "You are a dead man, you goddamn motherfucker, do you hear me. "You're dead."

Parker next called Larry Hughes, Chief; HR Management Service, at approximately 11:50 a.m. to report the call. Hughes asked if there were any witnesses present and Parker told him that Violet Hartsfield was in his office but that she had not heard the conversation. Hughes told Parker that he would contact the VA police and that Parker should provide a written statement to him of the conversation. Parker did provide a written statement and Hughes did contact VA police.

Although the Grievant acknowledged that she did call Parker on March 21sf, she denies threatening him. The Grievant maintained that she made frequent calls to Parker on Union business.

At approximately 2:00 p.m. on the same day, the VA police responded to a panic alarm set off at Parker's office, which is on

Agency premises. Parker, who was in his office with Malek Kamal, testified that he heard a loud bang at his office door. Parker instructed Kamal not to open the door for fear of what was outside the door.

After this incident the VA police installed a television camera above the Union office door and monitor in the office so that Parker could see who was outside his office. Parker testified that the telephone conversation and bang at the door left him shaken and although he was not afraid of the Grievant personally, he was afraid of the people that the Grievant knew. Parker did not elaborate on what this meant.

The evidence demonstrated that Parker did report the threatening phone call immediately after it happened and did hit the panic button in his office upon hearing a loud bang at his door that same afternoon. Larry Hughes testified that he had known Parker for some time and observed that Parker was quite upset and nervous about the telephone call. In addition to making a report with the VA police, Parker also testified that he made a report of the threatening phone call with the Houston Police Department.

As a result of the incidents that occurred on March 21st Chief Burke instructed his officers to bring the Grievant to the VA police office for questioning with Sergeant Gray. At approximately 2:15 p.m., Officers Shaw and Kelly went to the Grievant's office and brought the Grievant to the VA police office where Sergeant Gray was to conduct an investigation. Both officers testified that although the Grievant did eventually come with them, she was initially reluctant and wanted to know why Sergeant Gray could not come to her office to conduct his investigation. While en route to the police office, the Grievant shouted at two employees outside the canteen retail store asking them why they had not helped Gordon and that management was violating Union policies. The officers were able to guide the Grievant away from the employees and to the police office without further incident.

Sergeant Gray testified that he never got a chance to ask the Grievant any questions about the incidents that occurred that day as

the Grievant shouted at him that her brother was with the Houston Police Department and that he said the VA police were nothing but a "bunch of keystone cops." The Grievant furthermore told Sergeant Gray that he "wasn't anything but a goddamn Uncle Tom-ass nigger." The Grievant essentially did not dispute this interchange with Gray and maintains that she then invoked her *Weingarten* rights and refused to talk with Gray until she had Union representation.

After this outburst, the Grievant was instructed to sit in the hall in the VA police office, which she did. Chief Burke then gave the Grievant a letter dated March 21, 1997 that barred her from the VA Medical Center and placed her in a non-duty paid status. When the Grievant said she did not want to read the letter, Chief Burke read it to her. The Grievant refused to sign the bar letter and screamed at Chief Burke, "I'll have your job." Chief Burke left the bar letter and returned to his office. The Grievant testified that she then decided that she wanted to get her purse from her office. The Grievant testified that she "hurriedly" walked to the door. Officers Kelly and Shaw observed the Grievant running to the door which led back into the VA, whereupon Officer Kelly physically stopped the Grievant from leaving. Chief Burke then ordered that the Grievant be handcuffed and placed in a holding cell. The Grievant was then cited with disorderly conduct. The Grievant's sister retrieved her personal items from her office and the Grievant was eventually released from the holding cell.

Proposed Notice of Discharge - April 2, 1997

On April 2, 1997, the Grievant was issued a proposed notice of discharge that specified five charges against the Grievant. Charge (a) charges the Grievant with misconduct for the "deliberate refusal to carry out a proper order" when she refused to comply with Chief Burke's order on February 21, 1997. Charge (b) charges the Grievant with attempting to inflict bodily injury to VA police officers on February 21, 1997. Charge (c) charges the Grievant with the use of obscene language and disrespectful conduct as a result of the Grievant telling Chief Burke "You're management, don't fucking touch me" and yelling "you bastards" at the officers.

Charges (d) and (e) relate to the March 21, 1997 threatening telephone call to Haymon Parker, local Union President. Parker had been an Agency employee but was now Union President and located in Union offices on Agency premises. Charge (d) charges the Grievant with the use of obscene and abusive language and disrespectful conduct and statements that constitute a threat to inflict bodily injury to another. Charge (e) charges the Grievant with the use of obscene and abusive language and disrespectful conduct toward Sergeant Gray and the officers who had to restrain the Grievant from leaving the premises.

Harmful Error/Due Process Issues

During the grievance procedure and at the Hearing, the Union raised several harmful error and/or due process issues. The first involves the Agency's refusal to consider the Grievant's written response to the notice of proposed discharge. On April 11, 1997, Abraham Gordon submitted a seven-page written response to the notice of proposed discharge to the Director. On April 30, 1997, the Director wrote to the Grievant and stated the following:

1. I am in receipt of the response to the proposed discharge, dated April 11, 1997, from Mr. Abraham Gordon.

2. As you know, the American Federation of Government Employees (AFOF), Local 1633, has the exclusive right to determine who may represent you as specified in the Master Agreement between this Agency and AFGE. Since you have not provided a waiver of designation of representative from AFGE to recognize Mr. Gordon as your representative, the response to your discharge cannot officially become part of the evidence file.

On May 2, 1997, the Agency advised the Grievant by letter that the Director had sustained all of the five charges and that the Grievant's discharge would be effective May 9, 1997. A grievance was filed on May 9, 1997 and a Step 3 meeting was held on May 19, 1997. The grievance was denied by the Agency on May 22, 1997. Arbitration was invoked on May27, 1997.

Both the 1982 and the 1997 Master Agreements contain language designating the Union as the "sole and exclusive representative" for the defined category of employees. By letter dated February 20, 1997, the Union advised the Agency that "Mr. Gordon has been deleted from Union positions of A.F.G.E. Local #1633. Please do not recognize him in any capacity concerning Local Union activities."

Because the VA had been put on notice by the then-President of the Union, Haymon Parker, that Mr. Gordon was not an official representative of the Union, it was appropriate for the Agency to refuse to officially consider Mr. Gordon's written response on behalf of the Grievant. In fact, the Agency could very well have been in the position of committing an unfair labor practice had it dealt with or negotiated with an individual not recognized or sanctioned by the Union as its representative. Even if this had been a procedural error, which the Arbitrator finds that it was not, the Director testified that he did read Mr. Gordon's response and did consider it "unofficially." The Arbitrator therefore finds that there was no harmful error.

The second error raised by the Union alleges that the Agency Violated MP-5, part 1, Chapter 752 regarding disciplinary actions of Title 5 employees. Chapter 752, Section (1) states that:

The so-called "crime provision" of 5 U.S.C. 7513(b)(1) is concerned solely with the duration of the advance notice period and the opportunity to answer it. It does not deal with the employee's duty status during the advance notice period or the merits of the action.

(a) The agency may take an action with a shortened notice Period only when it has reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. If the agency has any doubts as to whether a "crime" for which a "sentence of imprisonment" can be imposed, OPM believes it would ordinarily be better practice to resolve those doubts in favor of the employee.

(b) An agency cannot invoke the "crime provision solely on evidence of the employee's arrest. However, if the agency had evidence that the employee was arrested *and* held for further legal action by a magistrate or was indicted by a grand jury, the agency would have reasonable cause for believing the employee had committed a crime. If the agency through its own independent investigation has acquired evidence which connects an employee with the commission of a crime, it must determine whether all the facts and circumstances uncovered constitute reasonable cause of believing the employee has committed the crime.

(c) Generally, to invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period, the agency would:

(i) Notify the employee that he or she is being put immediately in a non-duty status with pay for no longer than ten calendar days.

(ii) Give the employee a notice either of proposed indefinite suspension pending disposition of the criminal action or of proposed removal when the agency has sufficient evidence to warrant removal. The notice will tell the employee of the reasonable period for an answer (not less than seven calendar days).

(iii) Issue a decision on the action after the employee has
had an opportunity to answer and the agency has considered any answer.

(iv) Complete the action before the employee has been in
a non-duty status for more than ten calendar days.

The Union alleges that the Agency incorrectly invoked the crime provision that allows the Agency to shorten the advance

notice period. Specifically, the Union argues that the Agency violated subsections (i) through (iv).

The Agency has responded that the Grievant is not covered by Title 5 but by Title 38. Title 5 employees are those that conduct administrative business within the Agency, such as financial, personnel and housekeeping duties. Title 38 employees are those employees that provide direct patient care and are clinical in nature, such as doctors, nurses, and nurse anesthetists. Section 8.O1(a)(1)(e) clearly states that nurses are covered by this chapter. Disciplinary and major adverse actions for Title 38 employees are governed by MP-5, Part II, Chapter 8, not MP-5, Part I, Chapter 752. The Agency contends that Chapter 752 is therefore irrelevant.

The Agency also notes that it did not invoke the crime provision of Chapter 752 that allows the Agency to shorten the advance notice period due to current pending criminal charges for which the Agency could reasonably believe that a sentence of imprisonment may be imposed. There were no criminal charges pending against the Grievant when the action was taken. In addition, the notice period was not shortened. The notice of proposed discharge. was dated April 2, 1997 and the discharge was effective May 9, 1997. The Grievant therefore did receive 30 days notice of her discharge.

The Arbitrator was provided only two pages, an excerpt, from Chapter 752 and cannot determine with certainty that Chapter 752 does not apply to Title 38 employees as the Agency has argued. It is noted, however, that the Union has not rebutted the Agency's contention that Chapter 752 does not apply and that the Agency did not invoke the "crime provision of Chapter 752. Furthermore, the Union has not rebutted the Agency's contention that the Grievant did receive 30 days advance notice of discharge as the notice of proposed discharge was dated April 2, 1997 and the discharge was not effective until May 9, 1997. The weight of the evidence indicates that there was no harmful error. For all of these reasons, the Union's harmful error/due process charges are denied.

Discussion of the Charges

The issue in this dispute involves whether the Grievant's discharge was for such cause as would promote the efficiency of the service. The removal action was based on five charges involving three incidents of alleged misconduct. Charges (a), (b) and (c) involve the Grievant's conduct on the morning of February 21, 1997 when she was off duty and distributing flyers in the lobby. Charges (a), (b) and (c) therefore involve off duty misconduct arising out of the same incident. Charge (d) involves an alleged threat made by the Grievant to Union President Parker that occurred on March 21, 1997. The threat allegedly was made by the Grievant while she was on duty and on the Agency's premises. The Union's offices are likewise on Agency premises. Charge (e) involves conduct of the Grievant that occurred also on March 21, 1997 while the Grievant was on duty. Charge (e) involves the Grievant's conduct toward the VA police when they attempted to investigate the alleged threats made to Parker referenced in charge (d). All the charges involve conduct that occurred on Agency premises, however, only charges (d) and (e) involve conduct that occurred when the Grievant was on duty.

Section 8.09, MP-5, Part II, of the Agency regulations state that:

When taking a major adverse action against an employee, the Department bears the burden of proving by a preponderance of evidence the charges that form the basis for that action.

Each of the five charges will be reviewed in the context of their duty or off duty status in order to determine whether the Agency has met the appropriate burden of proof.

The Off Duty Misconduct of February 21, 1997

The general rule is that off duty misconduct by an employee will not support a discharge unless the employer has demonstrated that there is a nexus between the off duty misconduct complained of and the duties of the employee or the functioning of the employer's operations.

Charge (a)
Deliberate Refusal to Carry Out a Proper Order

On February 21, 1997, at approximately 8:20 am, you were approached by Chief David Burke of the VA Police at the main lobby of the medical center. You were ordered to discontinue passing out flyers announcing an unauthorized meeting in the fourth floor auditorium. You refused to comply with Chief Burke's order and were issued a United States District Court Violation Notice for distribution of flyers in violation of 38 CFR 1.21 8(b)(2 1). Your action of deliberate refusal to carry out a proper order constitutes misconduct.

Chief Burke, Officers Peet, Rencher, Shaw and Vasquez, Warren Robicheaux and the Grievant all testified regarding the events that occurred on the morning of February 21, 1997. There was also testimony from some witnesses who were in the lobby that morning and who observed some of the events. There is very little dispute about what happened the morning of February 21. Officers Peet, Rencher, Shaw and Vasquez all testified credibly, consistently and calmly regarding their efforts to comply with Chief Burke's request to remove the Grievant from the main lobby and yet to somehow get the Grievant to do this without resorting to force. The Grievant also confirms the essential events of that morning, that is, she was passing out flyers in the lobby when Robicheaux approached her and told her she must cease and desist. She challenged whether Robicheaux had any authority to make her stop which in turn caused Robicheaux to find Chief Burke. The Grievant admitted that although she stopped passing out the flyers, she told Chief Burke that she was not leaving the lobby and that she had as much right to be there as he did.

Based on the testimony of these witnesses and others at the Hearing, it is clear that although the distribution started out peacefully, the Grievant did become loud, belligerent and difficult. The record indicates that the police officers responded professionally and appropriately and attempted to get the Grievant to leave the lobby area peacefully but that the Grievant resisted arrest and had to be forcibly escorted out of the lobby.

The Grievant was engaged in protected activity and the Arbitrator does not believe, based on the evidence presented, that the Grievant was required to obtain prior approval to distribute the flyers. Although Section (G)(1)(c) of the Agency's regulation on Labor-Management Relations provides that the Parties may negotiate or reach an understanding regarding the content and size of material and that the Parties "could include provision for prior approval by management of material proposed for posting or distribution on VA premises" the evidence is insufficient to show that such an agreement or understanding was ever reached. The Agency has argued that there have been prior instances when the Union has asked for prior permission to distribute Union flyers and has asked that the regulation regarding a prohibition on distribution found in 38 C.F.R. Section 1.218 be enforced against other groups. The Union, however, has argued that they have not in the past felt it necessary to seek prior approval for the distribution of Union literature. The January 31, 1997 FLRA decision regarding the Grievant's distribution of Union literature does not indicate that prior approval was at all involved. Given this conflict in the testimony and without more evidence to support an agreement, the Arbitrator concludes that there was no agreement or understanding between Parties that the Union was required to obtain prior approval for distribution of Union literature.

The Union has argued that the Grievant was a victim of an unlawful order and that Article 16, section 16 of the 1997 Agreement protects the Grievant. That section states that employees have "the right to refuse orders that would require the employee to violate the law." The Arbitrator finds that this section has not been violated. The intent of this language is to protect an employee from having to commit an unlawful act. If the Grievant had complied with the instructions of either Robicheaux or Chief Burke by stopping the distribution and/or coming with Chief Burke to the police office to obtain approval for the distribution, she would not have been violating the law. Even if Robicheaux and Chief Burke were incorrect in their understanding of what the Grievant had to do in order to distribute the flyers, the Grievant would not have been violating any laws by complying with their instructions or orders.

Notwithstanding the fact that the Grievant's initial activity of distributing the flyers may have been entirely lawful, the Grievant did become loud and argumentative with Robicheaux, Chief Burke and the other officers when she was asked to stop. Even if Robicheaux and Chief Burke were wrong in asking the Grievant to stop distributing the flyers and to go to the police station, the Grievant's proper recourse or remedy was not to become loud, belligerent and create a scene in the lobby. As the federal judge noted in her December 30, 1997 ruling, Chief Burke did have probable cause to arrest the Grievant for making a disturbance under 38 C.F.R. Section *1.218(5).* That section proscribes conduct on property that creates a loud or unusual noise that unreasonably obstructs the use of the lobbies. The record indicates that the Agency has established by a preponderance of the evidence that the Grievant did deliberately refuse to carry out a proper order and that this deliberate refusal did constitute misconduct.

In order for the Agency to rely on the incident of off duty misconduct to discipline the Grievant, the Agency must establish a nexus to the Grievant's job duties. The Arbitrator notes that in a case cited by the Agency *(Sousa V. Department of the Army),* the test used was whether the off duty misconduct had a nexus to the efficiency of the service. Under either test, the Arbitrator finds that the result would have been the same.

The misconduct did occur on Agency premises and did involve Agency police. This does provide some nexus. However, the fact remains that the Grievant was engaged in a protected activity and was off duty at the time. There was insufficient evidence to indicate that the Grievant's failure to obey a proper order from Chief Burke in an off duty context had any effect on the Grievant's job duties as a nurse at the facility. In fact, the Grievant was functioning as a Union representative at the time of the disturbance. This was not a refusal to obey an order in the employer/employee context. And, although a disruption did occur on Agency premises, the Agency did not demonstrate that the Grievant's conduct caused a breakdown in the Agency's primary function, which is the delivery of patient care services to Veterans. For all the above reasons, although the Agency

has established that the Grievant failed to obey a proper order from Chief Burke, the Agency failed to establish a sufficient nexus between the off duty misconduct and the Grievant's job duties and/or the efficiency of the service.

Charge (b)

Attempting to Inflict Bodily Injury

On February 21, 1997, at approximately 8:20 a.m., in the main lobby of the medical center, you were instructed by Officer Lance Peet to accompany him to the police office which you refused to do. When Officer Peet attempted to handcuff you at the time of your arrest, you dropped to the floor swinging your arms which necessitated the assistance. of three other officers to restrain you for handcuffing. While being restrained and handcuffed, you attempted to injure two officers. Your actions resulted in being restrained by four police officers, handcuffed and taken into custody. You were issued a United States District Court Violation Notice for disorderly conduct in violation of 38 CFR 1.218(b)(1). Your actions constitute attempting to inflict bodily injury to VA police officers.

At the hearing, there was some discussion as to whether the Grievant had either intended or attempted to injure the officers. The Agency notes that Charge (b) specifies "attempted" and that this is defined in Black's Law Dictionary as "an endeavor to do an act, carried beyond mere preparation, but short of execution." While the Arbitrator appreciates precise language, it is not her intent to play semantic games. Words should be given their normal and customary usage unless it is apparent that the parties intend a more technical or specialized definition. The dictionary definition of "attempt" is "to make an effort at, try, undertake." Charge (b) therefore is viewed as whether the Grievant's actions constituted an effort or attempt to inflict bodily injury to VA police officers. The word "attempt" does denote that there was some intent, or a state of mind, that accompanies the action.

The Grievant testified that she did not intend to injure the officers and that in fact she was quite surprised to learn that there had been any injuries. Officer Rencher testified that she did not believe that the Grievant intentionally tried to hurt anyone. The evidence tended to show that the Grievant was attempting to resist arrest and to keep from being handcuffed. In these circumstances, however, it is proper to hold the Grievant accountable for the reasonable consequences that flowed from her actions. The Grievant chose to actively resist arrest by kicking, flailing and otherwise making it as difficult as possible for the officers to escort her out of the lobby. The Grievant must accept the reasonable consequences that flowed from her decision. Therefore, although the Grievant may not have consciously intended to injure, injuries did occur and the Grievant can be held accountable for them even if she did not specifically intend to injure anyone. The Agency has established by a preponderance of the evidence that the Grievant's actions did constitute an attempt to inflict bodily injury to VA police officers.

Like charge (a), the Agency must establish the nexus between the Grievant's injury of the officers and the efficiency of the service or her job. Although the incident occurred on Agency premises and involved Agency police, there was insufficient evidence introduced by the Agency to establish that the injury of the officers had a sufficient connection to the Grievant's performance of her job duties or the mission of the Agency to provide medical services for Veterans.

Charge (c)

Use of Obscene Language

On February 21, 1997, at approximately 8:20 a.m., when approached by Chief David Burke of the VA police in the main lobby of the medical center, you shouted words to the effect, "You'r6 management, don't fucking touch me," or words to that effect. You also yelled at the officers, "you bastards" when being taken into custody. You were issued a United States District Court Violation Nonce for disorderly conduct in violation of 38 CFR 1.218(b)(11). Your actions constitute use of obscene language and disrespectful

conduct.

Robicheaux's written statement and his testimony indicate that the Grievant yelled at Burke not to touch her or he would "see what happens." His testimony does not indicate that any profanity accompanied this. The only profanity that Robicheaux testified to was the Grievant asking Burke "Who the hell are you?"

Officer Peet's written statement indicates that the Grievant shouted profanity and then dropped to the floor but he does not indicate specifically what was said. Officer Peet testified at the Hearing that the profanity he recalled was the Grievant yelling to "quit kicking her in the ass." Vasquez, Rencher and Shaw all indicate in either their written statements and/or their testimony that the Grievant was talking loudly, screaming and/or yelling in the lobby that morning. None of them specified what profanity was used.

Viewing the testimony of Robicheaux, Burke, Vasquez, Rencher and Shaw as a whole, which was quite consistent, it is apparent that the Grievant got loud and hostile after Robicheaux told her that she must cease and desist distributing the flyers. The Grievant was not causing a disturbance until Robicheaux told her that she must stop. However, after that point, the Grievant did use profanity and did demonstrate disrespectful conduct to Chief Burke and the other officers. Even though Chief Burke was the only witness to testify that the Grievant said "don't fucking touch me," Robicheaux did indicate that the Grievant warned Burke not to touch her. Vasquez and Peet also confirmed that the Grievant was shouting profanities, even though they could not recall the specific words. Although the Grievant denied saying the words cited in the charge, the weight of the evidence does indicate that the Grievant did, in fact, use profanity. The Agency did sustain its burden in establishing by a preponderance of the evidence that the Grievant did use obscene language and did engage in disrespectful conduct.

Again, the Agency must also establish that there is a nexus between the Grievant's use of obscene language and disrespectful conduct and the efficiency of the service or the performance of her job

duties. The Agency did not show how the Grievant's use of obscene language and disrespectful conduct to Chief Burke in an off duty context and as a Union representative had a connection to the Grievant's job duties or the efficiency of the service.

Misconduct While On Duty

Charge(d)

Threatening Statements

On March 21, 1997, at approximately 11:50 a.m., you telephoned the President of AFOB Local 1633, Haymon Parker, and stated words to the. effect, "who do you thing you are you goddamn mother fucker, going around telling people that I am not handling their cases. You are a dead man, you goddamn mother fucker, do you hear me. You're dead." Your actions constitute use of obscene and abusive language and disrespectful conduct. Furthermore, your statements constitute a threat to inflict bodily injury to another.

The Grievant denied at the Hearing that she told Parker that he was a dead man. The Grievant also denied threatening Parker. Although the Grievant admitted that she may have called Parker that day, she only recalls calling him a "fat fucker" and chastising him for failing to help her out on February 21, 1997.

Parker testified that he knew the Grievant's voice and that he was sure it was she. Because this was a telephone call to Parker, no one else heard the exact words that were supposedly said to Parker by the Grievant on March 21, 1997.

The Agency introduced the testimony of Violet Hartsfield, who was in Parker's office when the alleged threatening telephone call was made, for the purpose of substantiating Parker's shaken reaction to the call and the Grievant's alleged admission to making the call. Hartsfield testified that she spoke to the Grievant after March 21, 1997 and that the Grievant had admitted to her that she had made the call but she did not see it as threatening Parker's life. The Union

objected to the admission of Hartsfield's testimony as the Agency did not take a statement from her and therefore no evidence from Hartsfield was included in the evidence file that was relied upon in developing the charges.

The Arbitrator has given Hartsfield's testimony little weight for several reasons. First, the Agency knew that Hartsfield was present in Parker's office when he received the allegedly threatening phone call from the Grievant yet the Agency did not interview Hartsfield or take any kind of statement from her at that time. Second, Hartsfield's credibility is an issue here. Hartsfield testified at the Hearing that she volunteered information about her subsequent conversation with the Grievant only after she concluded that "the way I've been treated by you (meaning Abraham Gordon) and the Grievant that I felt I didn't need to protect anyone." Hartsfield's testimony regarding how she had been treated by Gordon and the Grievant was never explained at the Hearing, however, it did appear to the Arbitrator that a certain degree of animosity or bad feeling had developed between Hartsfield and the Grievant and her advocate, Abraham Gordon. That Hartsfield was now willing to "tell the whole truth" was somewhat suspect and as a consequence has little probative value.

There are other witnesses, however, that did tend to support Parker's allegations that he was upset by the phone call on March 21, 1997. Larry Hughes, Human Resources, testified that he had known Parker for some time and that Parker appeared quite shaken and upset when he called Hughes after receiving the phone call. Similarly, Director Stott and Chief Burke also talked to Parker after the threatening phone call and found his behavior to be nervous, fidgety and extremely concerned.

Within an hour or two after the alleged threatening phone call, Parker pushed the panic alarm in his office after he and Malek Kamal heard a loud banging noise at the door. Parker asked for police protection and the VA police set up a television camera outside the Union office so that Parker could monitor who was coming to his office. Although it was alleged that the Grievant was "in the area" of the Union office when the loud bang was heard on the door, it does

not appear that the incident was very thoroughly investigated and no definite conclusion was arrived at regarding who did it.

In *Metz* **V.** *Department of the Treasury,* 780 F.2d 1001 (Fed. Cir. 1986), the Federal Circuit instructed the Merit System Protection Board to consider five factors in deciding whether an employee threatened his co-workers. These factors will be considered individually.

1. The Listener's Reactions. Based on the evidence in the record from the witnesses at the Hearing, Parker was visibly shaken and took certain actions in an effort to protect himself

2. The Listener's Apprehension of Harm. Parker reported the incident to VA management, Larry Hughes, and followed through on Hughes' instructions to write up the phone conversation and to report it to VA Police. Parker made a report to the HPD after he heard the loud bang at the door later that afternoon. Parker also testified, however, that he was not fearful of the Grievant but of the Grievant's friends.

3. The Speaker's Intent. Although the Grievant has admitted calling Parker that day, she has denied threatening Parker. The Grievant testified that she sometimes called Parker 2-3 times a day and does not recall what she might have said to him. The Grievant denied that she was upset or angry with Parker, however, in light of her relationship with Parker and how hard she worked to get Parker removed from office, it is more likely than not that the Grievant was upset or angry with Parker about having been removed as Chief Steward for the professional employees. Furthermore, the Grievant did testify that she was "enraged" when Parker fired Gordon from his Union position a month earlier.

4. Any Conditional Nature of the Statements. The statements alleged to have been made by the Grievant were not conditioned on any particular events or circumstances happening.

5. The Attendant Circumstances. This factor seems to be more important than some of the other factors in this analysis. At the time that this phone call occurred, Union tensions were mounting concerning the alleged illegality of Parker's appointment as interim President of the local. Parker had relieved Gordon of his duties as a Union representative and on March 19, 1997, Parker relieved the Grievant of her duties as Chief steward. It seems apparent that the Grievant may have been upset and/or angry with Parker as a result of his actions. Furthermore, as the record now shows, there was tension between Parker and the Grievant that ultimately resulted in the Grievant's filing of charges of sexual harassment against Parker with the VA and the Union. The Grievant alleged that this harassment began as early as 1995. The Union's investigation ultimately resulted in a finding that objectionable conduct had occurred on the part of Parker. Thus, the sexual harassment tensions that already existed between the Grievant and Parker and the more immediate events of the Grievant' 5 discharge as Union Steward combined to produce a more tense and strained relationship between the Grievant and Parker.

Under *Metz*, the trier of fact must consider what reasonable persons who heard the statements actually did. In this case, having recently heard a program on violence in the workplace, Parker immediately reported the incident to VA management. Hughes and Burke took precautions to ensure that Parker would be reasonably protected. The Arbitrator recognizes that Parker is not totally unbiased here, however, the actions that he took and the witness testimony surrounding this incident indicate that Parker did receive a threatening phone call from the Grievant that upset him considerably. The Arbitrator finds that the Agency has proved by a preponderance of the evidence that the Grievant's statements constituted a threat to inflict bodily injury to Parker under the *Metz* factors.

Although this incident occurred while the Grievant was on duty, this was not a threat between co-workers. This was a threat between two Union representatives who had been, in essence, going at it tooth and nail, if you will, for several months. The Arbitrator is concerned about upholding a removal action based on conduct that occurred between Union members involving Union business. There

is a very delicate balance that must be maintained here. The Agency undoubtedly has the right and even obligation to investigate acts or threatened acts of violence that occur on its premises. While it may have been appropriate to take action to protect Parker, to question the Grievant regarding the threat and to even severely warn any parties that adverse actions may be taken if any similar behavior occurs or continues, removal under these circumstances was not warranted. The Union does appear to have an internal Union grievance procedure, as evidenced by the fact that the Grievant filed a charge of sexual harassment against Parker. The Grievant's conduct was unacceptable here, but this threat may have been more appropriately handled at this stage within the Union.

Charge (e)

Use of Obscene and Abusive Language and Disrespectful Conduct

On March21, 1997, at approximately 2:15 pm., during a discussion in Room 1A-820C with Sergeant Fred L. Gray of the VA Police, you screamed words to the effect that your brother, who is an officer with the Houston Police Department, said the VA police were, "all nothing but a bunch of keystone cops." You also said Sergeant Gray, "wasn't anything but a Goddamn Uncle Tom-ass nigger." You then attempted to depart Police and Security Service which necessitated your being restrained, handcuffed and placed in a restraining cell. You were issued a United States District Court Violation Notice for disorderly conduct in violation of 38 CFR 1.21 8(b)(11). Your actions constitute use of obscene and abusive language and disrespectful conduct.

On March 21, 1997, Chief Burke asked Officers Shaw and Kelly to go to the Grievant's office and bring her back to the VA police office for questioning about the alleged threatening phone call made to Parker earlier that day. The Grievant testified that she was in her office typing when Officers Shaw and Kelly came to get her. After some initial, but mostly peaceful, resistance, the Grievant did accompany the officers to the VA police office.

Sergeant Gray testified that before he could even say hello to the Grievant she was yelling in his face that the VA police were nothing but a bunch of "keystone cops and that he was an "Uncle Tom-ass nigger." The Grievant did not deny that she said these things to Sergeant Gray. The Grievant's explanation for her behavior was that she had been harassed, especially by Robicheaux. Although the Union attempted to argue that the Grievant's comments to Sergeant Gray would not form the basis of a discrimination charge, it is noted that the basis of this charge is not discrimination but simply that the Grievant's actions constituted use of obscene and abusive language and disrespectful conduct. The written and oral testimony of Officers Shaw and Kelly corroborate that the Grievant did call Sergeant Gray an "Uncle Tom-ass nigger" and called the VA police a bunch of "keystone cops."

After Sergeant Gray. told the Grievant to essentially back away from him, the Grievant was presented with a bar letter from Chief Burke. Chief Burke read the bar letter to the Grievant. The bar letter signed by the Director, Robert Stott, stated that:

1. As a result of your threatening statements to the Acting President, AFOB, Local 1633 which occurred on Friday, March 21, 1997, you are hereby directed not to report to duty in the Surgical Service, or any part of this medical center, until further notice. It is my decision to place you on excused absence without charge to leave commencing upon receipt of this notice on Friday, March21, 1997, which will continue until further notice.

2. At any other time during this period of absence from duty should you need to visit this facility, you are to notify Dr. Jones, Chief Surgical Service, at (713) 794-7521, of such a visit. You may enter the VA Medical Center property only for legitimate and specific treatment as a veteran, or to conduct official business at the credit union or other public services of the facility. You may enter the property for these purposes only after notifying the VA Police and Security Service at 794-7106 prior to your arrival. The VA Police and Security Service will then issue you appropriate identification and escort you to your destination if necessary.

3. Please be advised, should you be found on the property without the prior knowledge of the VA Police and Security Service, the VA Police will take necessary action to remove you from the premises and may charge you with trespassing.

4. If you have any questions regarding this letter, please contact Dr. Jones, Chief, Surgical Service at (713)794-7521.

The Grievant then was instructed to sit at the table in the break area, which she did. The Grievant was given her copy of the bar letter. After a few minutes, Officers Kelly and Shaw heard some running noises and looked up to see the Grievant running toward the exit by the VA police window. This exit led back into the hospital. Officer Kelly physically stopped the Grievant and was then instructed by Chief Burke to place the Grievant in handcuffs in the holding cell. The Grievant was released after her sister showed up at the police office with her personal belongings.

The Grievant's explanation for running for the exit was that she had decided to get her purse and leave the premises. This was not credible under the circumstances. Although the Grievant had refused to sign the bar letter, it is clear from the evidence that the Grievant had received the bar letter and had had it read to her by Chief Burke. The officers observed the Grievant looking at the bar letter. It can therefore be reasonably concluded that the Grievant knew she was not to enter the VA premises without contacting Dr. Jones and getting a police escort. The Grievant's actions at this point appear to be in direct disobedience to a proper order and with the possible intent of engaging in inappropriate behavior. Based on the evidence before me, the Grievant's actions resulted in a reasonable conclusion by the VA police that the Grievant was engaging in conduct that was prohibited by the bar letter and that the Grievant was about to engage in further inappropriate conduct.

The Agency does have a legitimate interest in ensuring a safe workplace and in investigating possible threats that are alleged to have occurred on its premises. The VA police are representatives of the Agency and were conducting a legitimate investigation. In the

February 21, 1997 incident, the Grievant had shouted at Chief Burke that he was "management" and not to touch her. It therefore seems clear that the Grievant was aware that the VA police were Agency representatives.

The Grievant's conduct in charge (e) indicates that the Grievant not only failed to cooperate in a legitimate investigation but also acted disruptively and belligerently. The physical nature of the Grievant's conduct is a common theme in these charges. This charge, however, involves the Grievant's misconduct while on the job and her reaction to a legitimate and proper investigation by the VA police. The Grievant never asked if she could leave and get her purse. She jumped up and rushed for the door, causing the VA police to respond physically by chasing her, restraining her and handcuffing her. The evidence tends to show that the Agency has proven by a preponderance of the evidence that the Grievant did use obscene and abusive language and engaged in disrespectful conduct as described in charge (e).

The Penalty

Consideration of the Douglas Factors

In order to ensure that penalties for adverse actions are not arbitrary, clearly excessive, capricious or unreasonable, the Agency must review the penalty selection to determine if it is within the range allowed by law, regulation or any applicable table of penalties. The review of the penalty must also consider whether the penalty was based on a consideration of relevant factors (i.e., the Douglas factors).

The Director testified that he did conduct a review of the Douglas factors. If the Agency has not sustained its burden of proving each charge by a preponderance of the evidence, the arbitrator should conduct an independent evaluation to determine whether the sustained charges warrant the penalty imposed by the Agency. Sustaining the charges does not necessarily mean that the penalty imposed is appropriate when all of the Douglas factors are considered. Each factor will be reviewed.

1. The nature and seriousness of the offenses and their relation to the employee's dunes. position and responsibilities including whether the offenses were intentional or technical or inadvertent or were committed maliciously or for pain. or were frequently repeated.

All of the offenses that the Grievant has been charged with are very serious in nature. The offenses were either intentional or the result of what could reasonably have been expected to flow from the conduct. Charges (a), (b) and (c), however, do involve off duty misconduct which requires the Agency to establish a nexus between the misconduct and the individual's job duties. This particular Douglas factor also requires a similar inquiry. The Agency must determine the relation of the offenses to the employee's duties, position and responsibilities. Although the Agency has argued in its brief that the Grievant's conduct in charges (a), (b) and (c) are contrary to the VA's mission to provide medical services for Veterans and the Grievant's role as a nurse, there was weak evidence to connect the Grievant's role as a Union representative in this disturbance to the Grievant's job duties. Charges (a), (b) and (c) standing alone, therefore, would not support a removal action.

Similarly, although charge (d) involves on duty misconduct, the Grievant was functioning in her role as Union representative at the time the threat was made. Had the Union had offices off of Agency premises, it seems unlikely that the Agency would have gotten involved in this particular matter. This is not to say that anything that the Grievant does while performing in her role as a Union representative is somehow immune from discipline by the Agency. It is only to note that an employee's conduct or misconduct while engaged in Union functions may be handled differently on the continuum of employer/employee discipline.

Charge (e) involves intentional misconduct also of a very serious nature. This misconduct occurred while the Grievant was on duty. In response to efforts by the VA police to investigate the alleged threats made to Parker, the Grievant was called to the police office. The Grievant's behavior after she got there was hostile, uncooperative and physically out of control. As an employee, the Grievant did have an

obligation to cooperate with the Agency's investigation. Charge (e) also reflects a repetition of hostile, uncooperative and physical behavior on the Grievant's part.

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public and prominence of the position.

The Grievant is a registered nurse but her job duties at the Agency consisted of quality assessment of surgical procedures and not direct patient care or contact with the public. Although the Grievant may have had an assistant or secretary on occasion, the Grievant apparently did not supervise anyone. Similarly, the Grievant herself was largely unsupervised. In his write up of his consideration of the Douglas factors, Dr. Jones specifically noted that this lack of direct supervision requires a high degree of trust. The Grievant's demonstration of disrespectful conduct and her attitude on authority could reasonably have affected the level of trust that the Grievant's supervisor had in her.

3. The employee's past disciplinary record.

The Grievant did not have any prior formal disciplinary action taken against her.

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.

The Grievant had worked at the Agency since 1991 and her job performance was apparently successful. The Grievant's supervisor, Dr. Jones; did testify that over the years he had met "any number of people" that had difficulty getting along with the Grievant. Dr. Jones also testified that the Grievant sometimes became very angry in the office. Dr. Jones did testify that the Grievant was becoming increasingly difficult to work with and supervise, according to complaints of others. Dr. Jones noted that the Grievant's reaction to authority varied and that those who had to deal with the Grievant in

a supervisory capacity found her sometimes impossible to deal with.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisory confidence in the employee's ability to perform assigned duties.

The Grievant's supervisor was Dr. Jones and it was apparent from his testimony that he was often quite frustrated with the Grievant. The Grievant's job was to collect certain data points on a number of patients, enter this information into the computer and transmit it to the national data bank. The feedback that Dr. Jones was getting was that the information was not getting entered into the computer and that the data was several hundred cases behind. Dr. Jones' frustrations with the Grievant's job performance were heightened by the Grievant's misconduct.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

The Agency has argued that insubordination, use of obscenities, disrespectful conduct and negative behavior toward VA police and the Union President are offenses for which the removal penalty is appropriate and is consistent with Agency practice. The Director testified that the Agency had a zero-tolerance policy toward violence and had consistently and historically applied the removal penalty to other employees involved in misconduct of the same magnitude as of the Grievant. There was no specific evidence regarding any particular cases presented to support this.

The Union attempted to show that two employees, Sandra Ford Caesar and Katie Jones, had been threatened by other individuals and that the Agency had failed to protect them or take action similar to what was done to the Grievant. The individual who threatened Ms. Caesar, however, does appear to have been discharged by the Agency but reinstated by the MSPB. Ms. Caesar did not know why this individual had been discharged. Ms. Jones' ex-husband was also discharged and reinstated by the MSPB. Although Ms. Jones believed that nothing had been done to protect her, the Agency did introduce

a bar letter that was issued to Mr. Jones as a result of threats that he had made. What little evidence there is on this factor tends to indicate that the Agency has been consistent in its handling of threatening statements. As indicated, however, there was insufficient evidence to indicate whether the Agency has been consistent regarding recommending the removal penalty for insubordination and disrespectful conduct.

7. Consistency of the penalty with any applicable Agency table of penalties.

All of the offenses with which the Grievant was charged have as a minimum penalty a reprimand and removal as a maximum penalty. The removal penalty recommended for the Grievant was therefore consistent with what is allowed in the Agency's table of penalties.

8. The notoriety of the offense or its impact upon the reputation of the agency.

Charges (a), (b) and (c) arise out of conduct that occurred in the main lobby of the VAMC. There was evidence from numerous witnesses that employees, patients and visitors were exposed to this incident. The testimony from fellow employees indicated that they were upset that the situation had gotten so out of hand. The Grievant's conduct on March 21, 1997 in the police office also created a disruption. The common thread in all of the charges is that they all seem to involve incidents of disrespectful conduct, which includes use of obscene language and abusive behavior toward others. Although the incidents may not have made the front page of the newspaper, the Grievant's intent seems to have been to deliberately draw attention to herself and her cause. This strategy did result in a wider range of visibility than may have otherwise occurred had the Grievant filed a grievance or unfair labor practice charge.

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

The Grievant had received a written counseling on January 28, 1997, in which she was warned about her disrespectful conduct and use of obscene language on the job. It would seem to be self-evident that the use of obscene language, yelling at people in the workplace and creating a disruption would be possible disciplinary offenses. Whether or not the Grievant was aware of the Agency's Violence in the Workplace Policy, employees should know that violence in the workplace is not tolerated.

10. Potential for employee's rehabilitation.

In reviewing this factor, the Director testified that he considered an incident on April 25, 1997 in which the Grievant entered the VAMC in violation of her bar letter. The Director stated that the Grievant's visit to the VAMC had not been approved and that she had not notified the VA police prior to her visit as her bar letter required. On that date, Mr. Hershel Gober, Deputy Secretary of Veterans Affairs was visiting the facility. The Director wanted this visit to go smoothly and he did not want the Grievant to create an embarrassing disruption.

While the Director and Mr. Gober were in the lobby, the Grievant was spotted by Officer Munoz and Chief Burke in the lobby without a police escort. Officer Munoz and Chief Burke handcuffed the Grievant and took her into custody.

There is a direct conflict in the testimony regarding the Grievant's presence in the lobby unescorted by the police however. The Grievant indicated that she was taking the route she normally takes to the VA police office and Officer Munoz and Chief Burke indicated that the Grievant was attempting to enter the premises unescorted.

The VA police daily shift journal indicates that the Grievant did call the VA police on April 21. The entry in the daily shift journal states that at 0845, Dispatcher Miller received a telephone call from Dorothy Forte and she said that she was coming to the VA Medical Center to go to the EBO Office. Dispatcher Miller advised Ms. Forte

that she needed to come first to the VAPD office and she would be escorted to her destination.

Thus, it does appear that the Grievant did call in as required to indicate that she needed to be on the premises that day. The Grievant-did admit, however, that she wanted an interview with Mr. Gober and it is possible that she was. not following. the most direct route to the VA police office to obtain the necessary escort. Although this incident does tend to support the Agency's contention that the Grievant has demonstrated a low potential for rehabilitation, the Arbitrator notes that there are perhaps more probative factors.

Both the Director and the Grievant's supervisor testified that they believed the Grievant's potential for rehabilitation was extremely low. As indicated earlier, Dr. Stott testified that he was concerned about the Grievant's falling behind with data input and blaming others for problems she had. Significantly, Dr. Stott had counseled the Grievant regarding her use of obscene language.

The incidents discussed in the January 28, 1997 written counseling session coupled with the incidents involved in the instant dispute indicate a pattern. The pattern appears to be that the Grievant has difficulty accepting direction from those in authority. When the Grievant disagrees, she tends to challenge, defy and even bait those in authority. The Grievant is well aware that there are alternative means of addressing her complaints as she noted that she has filed grievances and unfair labor practice charges. When the Grievant also elects to pursue a path that is outside the normal channels, a path of self-help, she must accept the consequences that follow from those actions.

The Grievant has demonstrated by her conduct on more than one occasion that she has a quick temper. In fact, the Grievant appears to be a fairly unhappy person, aggressive, belligerent, and angry. At the Hearing, the Grievant accused the Agency of writing Parker's letters for him and for conspiring with the Union to harass the Grievant and her supporters. There was insufficient evidence presented to support the Grievant's speculation that Parker and his supporters had conspired with Agency

management to harass the Grievant and her supporters.

11. Mitigating circumstances surrounding the offense such as unusual job tensions personality problems. mental impairment. harassment or bad faith. malice or provocation on the part of others involved in the matter.

The threat that occurred on March 21, 1997 and that forms the basis of charge (d) had mitigating circumstances. As discussed earlier, the Grievant's comments to Parker on that day were made in the context of her having been dismissed as a Union steward for the professionals. These comments were also made in the context of a Union relationship as opposed to an employer/employee relationship.

There do not appear to be sufficient mitigating circumstances surrounding the Grievant's conduct as outlined in charge (e). Although the same Union internal tensions were present when the Grievant was asked to report to the VA police for questioning, there was no indication of bad faith or malice on the part of the VA police. The circumstances in charge (e) indicate that the VA police were attempting to investigate a threat to another individual made on their premises. As Parker had identified the Grievant as the maker of the threat, it was reasonable for the VA police to want to discuss it with her. The Agency had a legitimate business reason to ensure safety in the workplace and the Grievant had an obligation to comply with a proper investigation in an orderly manner.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Agency has argued that the Grievant's violent behavior requires the ultimate sanction of discharge otherwise a wrong message will be delivered to other employees. The Agency also notes that discharge is appropriate based on the circumstances when there is a combination of offenses. The table of penalties does indicate that discharge is available as the maximum penalty for the offenses with which the Grievant has been charged.

Although the Grievant only has a letter documenting a written counseling session for disrespectful conduct and the use of obscene language and no prior disciplinary action, the pattern of similar conduct of disrespectful behavior toward others and an inability to control her temper tend to support the Agency's determination that alternative sanctions would be ineffective in deterring the Grievant's unacceptable conduct.

Review of the Submitted Cases

The Agency has submitted several cases that deal with the issues of off duty misconduct, physical assaults and threatening statements made to others. These cases will be discussed each in turn.

In *Sousa V. Department of the Army, 97* FMSR 7006 (Fed. Cir. 1997), Sousa, a fifteen year employee was discharged based on charges of fighting/creating a disturbance; insubordination; and failure to follow administrative rules where safety of persons or property was not endangered. The Federal- Circuit stated that:

To have a removal action sustained, the agency must prove by a preponderance of the evidence that: (1) the employee did what he was charged with doing; (2) there is a nexus between what the employee did and disciplining the employee to promote the efficiency of the service; and (3) the penalty was reasonable. (Citations omitted)

In this case, employee Sousa was arrested -at his home for operating a motor vehicle while his driver's license was suspended. Sousa resisted arrest and ended up giving one officer a bloody nose and injuring another officer in the ribs and shoulder. Although the employee in this case denied that he committed the offenses and argued that the officers who arrested him perjured themselves, the court upheld the administrative judge's (AJ's) determination that the employee's testimony of the events was simply not credible. The court found that there was substantial evidence that Sousa fought with the officers, created a disturbance and was insubordinate. Sousa did not dispute that the agency established a nexus between the charged

misconduct and the efficiency of the service and instead argued that the penalty was excessive. There is therefore no discussion in this opinion as to what the nexus was between the misconduct and the efficiency of the service.

The AJ weighed Sousa's 15 years of service and no prior disciplinary action with the conduct involved, finding that the injury of two officers was indeed serious. The AJ found that Sousa's violent behavior toward the officers established his complete lack of respect for authority. The penalty of removal was consistent with the agency's table of offenses and penalties. Sousa did not exhibit good potential for rehabilitation according to the AJ and she characterized his "unconvincing excuses" as a sign that he had no sincere regret for his behavior or conscious decision to reform. The removal was therefore affirmed.

The Grievant's case is somewhat similar but distinguishable from the fact situation in *Sousa.* Like Sousa, the Grievant has several years of service and no prior disciplinary action. Because Sousa did not argue the issue of the nexus between the off duty misconduct and the efficiency of the service, it is impossible to compare this aspect of the case to that of the Grievant's. Unlike Sousa, however, the Grievant's off duty misconduct involved her conducting business as a Union member. Sousa was not engaged in any type of protected activity. The AJ did not find Sousa's excuses for his conduct and his rendition of the events credible. The Grievant here did not make excuses and her version of the events was not essentially in contradiction with the police officers.

In *Lowell* V. *Department of the Air Force,* 10 M.S.P.B. 391, 11 M.S.P.R. 453 (1982), an air force security clearance clerk was discharged based on charges of misuse of commissary privileges; driving on agency property while intoxicated; striking two parked cars; physically resisting security police and using abusive language. The removal was based not only on these charges but also on two prior instances of disciplinary action. The Merit Systems Protection Board ("Board") noted that:

The Board held in *Merritt V. Department of Justice, 6* MSPB 493, 6 M.S.P.R. 585 (1981) that in adverse actions based on off-duty conduct, a nexus must be established linking the employee's off-duty misconduct with the efficiency of the service.

The Board found in. *Merritt* that the requisite nexus was clearly established as the actions of the employee occurred on agency property and required the use of the base security police and investigative personnel. The Board found that the activities of the agency were disrupted and the agency resources were unduly burdened.

What makes the *Merritt* case different from the Grievant's case is the type of misconduct involved. The Grievant was engaged in protected activity on February 21, 1997. The actions of the employee in *Merritt* clearly involved unprotected activity. Setting aside the charge of physically resisting security police and using abusive language, which is similar to the Grievant's case, the employee in *Lowell* was charged with driving while intoxicated on agency property and striking two parked cars. The employee's actions to begin with were unsupportable. In contrast, the Grievant here was engaged in a lawful activity and subsequently overreacted. Also, the employee in *Lowell* had two prior instances of disciplinary action that the Grievant does not.

In *Robinson V. US Postal Service,* 30 M.S.P.R. 678 (1986), the Board upheld a removal of a distribution clerk based on failure to perform work as requested, insubordination and threatening a supervisor. The employee had four years of service and no past disciplinary action. The Board found that the agency had proved the threat charge based on the factors set forth in *Metz* and that this finding was not challenged on review. The Agency did establish the threat charge by a preponderance of the evidence in the Grievant's case. However, the employee in *Robinson* threatened his supervisor while the Grievant here threatened the Union president, not her supervisor or a coworker. Although threats to inflict bodily injury are indeed serious offenses, the surrounding circumstances must be

reviewed as the *Metz* case indicates before a penalty of removal may be imposed. In the Grievant's case, the statements made by the Grievant to Parker were made in the context of an internal Union dispute. The Arbitrator does not mean to imply that an employee may threaten another Union member with impunity, especially when the threat occurs on work time and on work premises. The Arbitrator also does not mean to imply that such threats cannot be investigated or disciplined. On the contrary, they can be and the Agency has a legitimate business interest in ensuring workplace safety. In the circumstances presented here, however, the threat incident standing alone would have been more appropriately handled within the Union initially.

In *Poarch v. Department of the Navy*, 22 M.S.P.R. 34 (1984), the employee appealed his removal based on charges of threatening to inflict bodily injury on another and disrespectful conduct. The Board noted that threats of bodily harm and disrespectful conduct are serious offenses that have a direct effect on the efficiency of the service. The Board found that removal even for a first offense is not necessarily too harsh. The particular facts of the threats and disrespectful conduct were not discussed in the case it is therefore impossible to compare this case to the Grievant's case. It can only be noted that the Board found that the presiding official's determination was supported by a preponderance of the evidence and that removal was within the bounds of reasonableness.

In H*atton v. Veterans Administration*, 7 M.S.P.B. 31, 7 M.S.P.R. 103 (1981), the agency's decision to remove the employee was sustained based on charges that the employee physically assaulted another employee, physically threatened her and refused to allow her to leave an office. The decision was also based on the employee's past disciplinary action. Once again, the specific facts involved were not discussed which makes it difficult to then compare to the Grievant's situation. It is noted, however, that the present dispute does not involve past disciplinary action.

Mitigation of the Penalty

This was a very emotional and highly charged case. There was much at stake for both the Union and the Agency. Both Parties vigorously presented their arguments and positions. The Union, in particular, made every effort to ensure that the Grievant was afforded every possible consideration during the proceedings and that the Union's position and arguments were clearly understood. The Grievant's actions for which she was discharged arose from her feelings of loyalty toward Abraham Gordon and her belief that certain Union members were not adhering to the Union Constitution and by laws. The Grievant's loyalty and concern about following the Union Constitution and by laws are positive and admirable traits. However, the tragedy is that the Grievant's conduct crossed the line. While the Agency's conduct cannot be seen to be entirely blameless, the Grievant's overreaction in each instance exceeded what is acceptable in the workplace.

The Grievant's conduct in all of the charges was very severe. Because the Grievant was attempting to resist arrest and cause attention to her plight in the lobby, two officers were injured. Although their injuries were not serious, the Grievant's conduct was extreme and unreasonable. The evidence indicates that the Grievant did overreact when she was asked to stop distributing the flyers and to leave the premises. While the Grievant's physical resistance cannot be justified, and in fact she has been punished by the criminal justice system, her conduct was based on her belief that she was engaged in a lawful, protected activity. There is a weaker nexus, however, to connect this misconduct with the Grievant's job duties or the efficiency of the service. Although the Agency has proved by a preponderance of the evidence that charges (a), (b) and (c) are more likely true than not, the weaker nexus between these charges and the Grievant's job duties or the efficiency of the service do not alone support a removal action.

Charge (d) likewise, standing alone, would not support a removal action. Although the conduct is serious, the misconduct occurred between Union members and should have been handled as an internal Union matter at this stage.

Charge (e) is fundamentally different from the other charges. The Grievant was on duty and was dealing with Agency representatives. The Agency had a legitimate interest in investigating an alleged threatening incident. The Grievant knew, or should have known, that her abusive conduct toward VA police was totally inappropriate. The Grievant had at this point the incidents of February 21 and March 21 that reflected her inability to control her temper. Charge (e) standing alone supports the Agency's decision to recommend removal. The Arbitrator finds that the penalty of removal of the Grievant based on Charge (e) is not too severe or extreme under the circumstances.

Award

The discharge of the Grievant on May 9, 1997 was for such cause as would promote the efficiency of the service. The grievance is denied.

Signed this 22nd day of May 1998

in Houston, Texas
C. Toedt, Arbitrator

Maretta

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TITLE 5, U. S. CODE, § 7121

Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that--

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a

grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and

III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected--

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

TITLE 5 U. S. CODE, § 7512.

Actions covered

This subchapter applies to--

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

TITLE 5, U.S.CODE § 7703

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

DEPARTMENT OF VETERANS AFFAIRS

Medical Center
2002 Holcombe

Boulevard

Houston TX 77030

MAY 0 2 1997 In Reply Refer

Ms. Dorothy Forte
10914 Paulwood
Houston, Texas 77071

SUBJ: Discharge

I. In connection with the letter of April21 1997, in which you were given advance notice of your proposed discharge, a decision has been made to discharge you from employment with the VA effective May 9, 1997, based on the following reasons:

> The reasons cited in paragraphs 1.a., 1.b., 1.c., 1.d., and I.e. of the proposed discharge letter of April 2, 1997, arc sustained.

2. In reaching this decision, I have care&11y considered the evidence upon which the proposed action was based. You did not submit a written response nor did you request an opportunity to present an oral response.

3. I have also considered other factors including your years of service, your past work record, -the seriousness of the offenses with which you have been charged, and whether there arc any mitigating or extenuating circumstances which would justify mitigation of the proposed penalty. I have concluded that the sustained charges against you are of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of discharge is appropriate and within the range of reasonableness.

4. Since the reasons cited in the proposed discharge letter of April 2, 1997, do not involve a question of professional conduct or competence, you may appeal this action under the VA grievance

procedure. However, if you are a bargaining unit employee, you may appeal it under the VA grievance procedure or the negotiated grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action at such time as you timely file a -grievance under either procedure. If you elect to file a grievance through the VA grievance -procedure in connection with this action, you have the right to request a hearing. Any request for a hearing must be submitted with your grievance. A grievance filed under the VA grievance procedure must be submitted td the Director within 15 calendar days of the date you receive this -letter. A grievance filed under the negotiated grievance procedure must be submitted not later -than 30 calendar days after receipt of this letter.

5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or handicap, you may file a complaint of discrimination with the VA in accordance with EEO discrimination complaint procedures.

6. If you elect to file a complaint of discrimination with the VA, your complaint will be processed in accordance with EEOC regulations at 29 C.F.R. Part 1614. If you file a complaint of discrimination, you may do so only after contacting an agency EEO counselor, who will attempt to informally resolve the matter. You must contact the counselor within 45 calendar days of the effective date of this personnel action. A complaint is deemed filed on the date it is received by an appropriate agency official, or on the date postmarked if addressed to an appropriate agency official designated to receive complaints.

5.

7. A further explanation of your appeal rights may be obtained by contacting the Labor-Management Relations Section of the Human Resources Management Service, extension 7763.

ROBERT F STOTT
Director

DEPARTMENT OF VRTERANS AFFAIRS
Medical Center
2002 Holcomb. Boulevard
Houston TX 77030

In Reply Refer To: 580/112

APR _2 1997
Ms. Dorothy Forte
10914 Paulwood
Houston, TX 77071

SUBI: Proposed Discharge

1. This is to notify you that it is proposed to discharge you from employment with the VA based on the following reasons:

a On February 21, 1997, at approximately 8:20 am, you were approached by Chief David Burke of the VA Police at the main lobby of the medical center. You were ordered to discontinue passing out flyers -mm-mg an unauthorized meeting in the fourth floor auditorium You refused to comply with Chief Burke's order and were issued a United States District Court Violation Notice for distribution of flyers in violation of 38 CFR 1.213). Your action of deliberate refusal to carry out a proper order constitutes misconduct

b. On February 21, 1997, at approximately 8:20 am, in the main lobby of the medical center, you were instructed by Officer Lance Peet to accompany him to the police office which you refused to do. when Officer Peet attempted to handcuff you at the time of your arrest, you dropped to the floor swinging your arms which necessitated the assistance of three other officers to restrain you for handcuffing. While being restrained and handcuffed, you attempted to injure two officers. Your actions resulted in being restrained by four police officers, handcuffed and taken into custody. You were issued a United States District Court Violation

Notice for disorderly conduct in violation of 38 CFR 1.218 (b)(11). Your actions constitute attempting to Inflict bodily injury to VA police officers

C. On February 21, 1997, at approximately 8:20 am, when approached by Chief David Burke of the VA Police in the main lobby (1110 medical center; you shouted words to the effect,
"You're management, don't fucking touch me,"or words to that affect You also yelled at the officers, you bastards when taken into custody. You were issued a United States District Court Violation Notice for disorderly conduct in violation of 38 CFR 1.218 (b)(11). Your actions constitute use of obscene language and disrespectful conduct.

d. On March 21, 1997, at approximately 11:50 a. m., you telephoned the President of AFGE Local 1633, Haymon Parker, and stated words to the effect, "who do you think YOU are you goddamn motherfucker, going around telling people that I am not handling their cases. You. are a dead man, you goddamn motherfucker; do you hear me. You're dead." Your actions constitute use of obscene And abusive language and disrespectful conduct. Furthermore, your statements constitute a threat to inflict bodily injury to another.

e. On March 21, 1997, at approximately *2:15* p.m, during a discussion in. Room 1A-820C with Sergeant Fred L. Gray of the VA Police, you screamed words to the effect that your brother; who is an officer with the Houston Police Department; said the VA police were, "all nothing but a bunch of keystone cops." You also said Sergeant Gray, "wasn't anything but a Goddamn Uncle Tom-ass nigger." You then attempted to depart Police and Security Service which necessitated your being restrained, handcuffed and placed in a restraining cell You were issued a United States District Court Violation Notice for disorderly conduct in violation of3S CFR 1218 ~ 1). Your actions constituted use of obscene and abusive language and disrespectful conduct.

2. You have the right to reply to this notice orally or in writhing, or both orally and in writing, and to submit affidavits in support of your reply, showing why the changes are unfounded and any other reasons why your proposed discharge should not be effected. You will be given until the close of business 14 calendar - from the day you receive this notice to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted through me to the Director. The Director will receive your oral reply, or will designate an official or officials to receive it. if you do not understand the '0ve reasons why your discharge is proposed, contact me or the Labor-Management Relations Section of the Human Resources Management Service, extension 7763, for a further explanation

3. The evidence on which this proposed action is based will be available for your review in the Human Resources Management Service. if otherwise in an active duty status, you will be allowed 8 hours of official duty time for reviewing the evidence relied upon to support the reasons this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

4. The final decision to effect the action proposed has not been made. In making the final decision, the Director will give full and impartial consideration to your reply, if a reply is submitted.

5. If it is the decision of the Director that you be discharged, your discharge will be effective not less than 30 calendar days from the day after you receive this notice. You will be given a written decision within 21 days of the receipt of your reply, or of the dose of business 14 calendar days from the day you receive this notice, If you do not reply.

6. You will be retained in a paid non-duty status during the advance notice period.

7. You have the right to representation by any individual of your choice, subject to agency disallowance. However, if you are a

bargaining unit employee, you have the right to representation by AFGE, Local 1633 or any individual of your choice, designated in writing by AEGE, Local' 1633, to serve as their representative The designation of any representative must be made in writing. You and your representative. if you have one are assured of freedom from restraint, interference, coercion, discrimination, and reprisal in presenting your case.

James W. Jones, M.D.
Chief, Surgical Service

Sent certified mail acknowledged receipt and regular mail on April 2, 1997.

EMPLOYEE ACKNOWLEDGED RECEIPT

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
DALLAS REGION

STATE OF TEXAS	CASE NAME VAMC- HOUSTON
COUNTY OF HARRIS	CASE NUMBER DA-CA-70570, 70536, 70573, 70552, 70554, *70556*, and 70596.

AFFIDAVIT

I, Dorothy Forte, living at

10914 Paulwood Houston, Texas 77071

telephone HOME 713-271-5040, in cooperation with an official investigation being conducted pursuant to the Federal Service Labor-Management Relations Statute under oath, I do hereby make the following voluntary statement. I have been assured by an agent of the Federal Labor Relations Authority that this statement will be considered confidential by the United States Government and will not be disclosed unless it becomes necessary to produce the statement if I testify at a formal proceeding. If necessary, I will testify as follows:

I am not currently employed by the U.S. D.V.A. I was employed at the Houston VA Medical Center pri6r until May 9, 1997 when I was discharged.

I was employed at the Houston VAMC for 6 years.

My last position was Surgical Clinical Nurse Reviewer, Title 38 10 step 10.

My last supervisor at the VAMC, Houston was Arthur Beal.

I am currently a member of AFGE Local 1633. r have been a Union member for about 2 and
a half years. After the first of my membership, I became the Union's Chief Steward of the
Professional Unit Since May 8, 1997, I have been the First Vice President and Chief Steward of the Professional unit.

I have been terminated from my position at the VAMC in Houston. r believe that my termination was a result of my engaging in protected activity. Additionally, I have been barred from the VAMC Houston facility. As such I am not able to complete my duties as the Union's elected First Vice President and designated Chief Steward of the Professional Unit.

A chronology of the events that occurred follows:

The situation started on the morning of February 21, 1997. I was standing in the lobby of the VAMC-Houston at 7:30 am. I was standing in the lobby distributing fliers to the employees who were either leaving at the end of their shift, or arriving for the start of their shift. The fliers were about an internal Union matter, specifically regarding the firing of our Union representative, Abraham Gordon by Haymon Parker. Parker had been a Union First Vice President of the non-professionals. Upon the retirement of the President of the Local, he and the old Local President arranged it so he could assume the Presidency. Parker was in that position illegally, under our new Local Constitution. We did not have copies of that Constitution at that time, but under it, an election was clearly called for.

I was upset at the level of representation that Parker was providing the employees, and myself and a couple of other officers or stewards decided to get a petition together to call for Mr. Gordon's reinstatement. The fliers called for employees to come to a meeting at

lunch time in the auditorium of the facility to meet with Parker about the issue and to sign the petition.

I gained knowledge of Gordon's firing from his Union position on the 20th of February; 1997 at about 4:30 p.m. I started the petition drive at that time. I did not have time to reserve the auditorium for the next day at noon because the person who maintains the master list of reservations was already gone for the day. That secretary also does not come in until 7:30 or 8:00 am which was after the first shift change. I do have access to copies of room reservation log both as a Union official and as an employee. I checked that log, and noted that half of the auditorium was not scheduled for that day. Thus, I concluded that the Union could use the other half of the auditorium which can be partitioned. In the past, the Union has used only half of the auditorium for meetings, and I recall many times at Union meetings when we used half of the auditorium, and other groups used the other half at the same time. Indeed, even if some other group had signed up for the other half of the auditorium that day, the Union could have either met in the hall, or had one person direct members to an outside gazebo.

So I was standing at the front door in the main lobby on the morning of the 21st of February. I had previously handed out Union information at that location many times. I have also seen other groups handing out information at that location. For example Union benefit representatives as well as our National Recruiters have handed out information at that location. The Veterans Womens Association is also often passing out information in the lobby. Also the Police Department of Houston passes out safety information in the lobby. Further, community groups, such as AIDS awareness groups have passed out information there. Also, the Houston Cellular Phone lady, who is an independent business person who is unrelated to the VA has handed out information in the lobby, as well as distributed information around the VA. The Union, to the best of my knowledge, has never had to ask permission to hand out fliers. Moreover, I have never been told, and am unaware of any other groups that were told that we needed to seek any special clearance to distribute information in the lobby.

At about 8:00 a.m., I noticed Warren Robicheaux, Senior Labor Relations Specialist, and Phyllis Isiminger, a Labor Relations Specialist coming off of the main elevator. I noticed that Robicheaux was collecting the fliers from the employees, as he walked toward me. At that point the employees began to congregate around me. The Union thinks his taking the fliers represents an attempt to sensor our communications with the employees.

Robicheaux approached me and asked me for a copy of a flier. I said sure, and I handed him a copy. He and Isiminger then read it. He then said to me that he had to ask me to cease and desist from the handing out of the fliers immediately. He also asked me if I was on duty. I said that I was on annual leave. I also said that I had a right to be there, and to pass out the fliers. I said I had as much right to be there as he did, and that I was working for the Union. He again stated that he had to ask me to leave right then, or he would call the VA Police. I said that I was not leaving, and I continued to pass out the flier. He told Isiminger to wait, and he left the lobby to get the police.

About five minutes later, Robicheaux returned to the lobby with an individual in civilian clothes. I had never seen that individual before. I have since discovered that the individual was VA Police Chief David Burke. Burke told me that I had to leave the area immediately. He did not identify himself to me at that point. I then asked him who he was. He showed me his badge, and he said that I was illegally in the lobby passing out the fliers, and that I had to leave right then. I said that my actions were not illegal, that the Union has rights, that he maybe was new and was unaware of the Union's rights, but that I had a right to distribute the fliers. He said my actions were illegal and that I needed to stop and if I didn't he would call the police and arrest me. I said look, you are new here, Robicheaux knows that I have a right to be here, and the FLRA has ruled that I have a right to hand out the fliers. At that point, Burke said, that is enough, and got on his radio, and called the police.

Within a minute or so, three police officers came running into the lobby. At that point, I would estimate that there were 20 to 25 people watching the situation. Employees who I know who watched the incident include Pat Jordan, Maryama Jacobs, Tony Hall, Tammie

Welcome, and I am sure there are others.

One of the Policeman, Officer Lance Pete, came right up to my face and said tat I had to come to the Police Station. I told him he knew I had a right to be there because he was a Union member. Pete told me that I should not give him a hard time because he was just doing his job. I said that I was not leaving, and that I was not leaving quietly. I then spoke up so all of the employees could hear me and I said that I had a right to be there, to pass out the fliers, and that I had a right to communicate with the employees. Chief Burke said "Cuff her." My arms were then twisted behind me, which was hurting me. I think that someone kicked my legs out from under me, because I wound up on the floor. There was a scuffle. I did not fight back, but I was twisting and I was saying that the handcuffs were hurting me. The officers had a hard time handcuffing me. At one point, a knee was put in my back while I was on my side. This was done so I could be cuffed. Two officers were sitting on my legs. I did not kick nor scratch anyone. Indeed, my nails have acrylic on them, which makes it hard, if not impossible to scratch anyone. Moreover, I never attempted to hit or scratch or kick any of the officers.

After I was cuffed, two officers lifted my legs, and Pete had my back, and I was carried out of the lobby, through the clinics to the jail. My dress was up to my chest. The jail/holding cell is located on the first floor in the police area.

I asked for the cuffs to be loosened. Two officers loosened them. I was then strip searched, and then the cuffs were removed.

Ultimately, I was given three tickets and was released when my sister came and got me. In total, I would estimate I was held against my will for about an hour. I was not told why I was arrested or of what I was being charged.

After I was released, I went first to employee health about my writs, back and feet. After that I went to X-ray to be X-rayed. I then went to Auditorium. I arrived at the auditorium at about 12:00 on the 21st of February, which is when the meeting was set.

At the Auditorium, the door was closed, Warren Robicheaux and Mike Lutz were standing outside of the auditorium, and there was a notice posted on the door signed by Haymon Parker which stated that the Union meeting was canceled. At that point, all of the Personnel staff and management/administrative staff lined up in the hallway. I also saw several service chiefs who were present. I believe the Service Chiefs were there to make sure that no employees who weren't on their lunch break were in the area. I also think that the Service chiefs' presence had the impact of intimidating the employees.

Someone said maybe Mr. Gordon, that we didn't have to meet in the Auditorium, and that we could go outside into a gazebo. I would estimate this occurred at about 12:30. Gordon also reminded the employees to make sure that they were on their lunch hours as their service chiefs were walking about.

About 20 of us went to the gazebo, and many had to go back to work, as their lunch period was over. Before I went to x-ray, I checked the auditorium, and noted that it was partitioned in two. At noon, I checked it and noted that the partitions had been removed. There were about 5 doctors standing in it.

Agency representatives Driggers, Lutz, Isiminger, and Robicheaux followed us and walked up and down in front of the front door of the hospital which about 45 feet away from the gazebo, but in full sight of the gazebo. I also think our conversation could be overheard. At some point, the chief of housekeeping, Harvey Reed also came down. The meeting then ended.

The next significant event relevant to the Union's charges occurred on March 21, 1997. I spoke to Parker every day about the representation of the employees. For example, I often called him when I learned that employees arbitration cases had been canceled or that he had decided on a professional policy without consulting any professional. I asked him what he was doing, I reminded him that he didn't know what he was doing, and that he was not legally the President. while I may have called Parker on March 21, 1997, I did not state that he was a dead man, or in any way threaten him. While in the past I might have sworn

at him, even called him a fat fucker, I did not threaten him by stating "You are a dead man, you goddam motherfucker, do you hear me. You're dead." I may have said who do you think you are you fat fucker. I did have a conversation with Parker about who was representing the Professionals, and probably asked him if he was crazy, doing what he was doing. Again, I never threatened him, or told him he was a dead man. I do not know how Parker came up with the statement, but by that time, Parker had already fired me from my Union position on March 19, 1997. Parker knew that I had gone to the National Union and had protested his usurpation of the position of President, and therefore was working was to have him removed. Indeed, by that time, I think he had been told by the National Union that he had to step down. I believe he was told this in the last week of February by Roy Flores who is the Union's Regional Vice President. Tom Scillian, a Professional Nurse, overhead Flores tell Parker, in February during a conference in Washington, D.C., that Parker would have to vacate the office in about seven days. I think that in a later meeting, Parker was told if there were no protests, he would be allowed to stay in office until 1998.

At about 2:00 pm on the 21st of March, I was working in my office and two female officers, N. Shaw and A. Kelley. They told me that I had to accompany them to the police department for questioning. I asked them why. They said they didn't know. I told them they needed to tell me what was going on. They said they didn't know, but that they were just required to bring me there. I said I wanted to call Mr. Gordon. They said I could not call Gordon, and they radioed the chief of Police who said that I should be handcuffed and dragged down. One officer said no, she would not do that, and she requested that I come with them. I again asked to call Gordon. One of the officers called Gordon in my presence and spoke to him I got on the phone. Gordon told me to go and see what they want, but to not give the police a statement. I therefore, accompanied the officers to the jail.

At the jail, Burke met me. He told me he wanted me to sign something, and I refused. I then went into a room at his direction. After a while, I was taken into Sergeant Gray's office. Gray said he had some questions to ask me and that he wanted to take a statement. I told him that I was invoking my Weinganen rights, and that I wasn't

going to talk to him. He told me to sit, so he could ask me questions. I again said I wasn't talking to him. I told him that my brother said that he and the officers of the VA police were a bunch of keystone cops who didn't know what they were doing. I also told him that he as an ass kissing Uncle Tom Nigger. I also said that my Brother is a Houston Police Sergeant, and he told me the VA police didn't know what they were doing when they arrested me the first time. Gray then said, OK, get the hell out of my office, and directed me to get out of his office. I returned to the waiting room, and Burke came in. Burke started reading a paper that stated that I was barred from the property, dated March 21, 1997. Burke told me to sign it, but I refused. He laid it on the table and walked out.

I then started to leave the office. when I touched the door, I was jumped by three police officers. I was then handcuffed, and dragged back to the cell. I asked what they were doing. They said I was under arrest. I asked why I was under arrest and they said because I was resisting arrest. This was odd because I had not been previously told that I was being arrested. I was again put into the cell and stripped searched. I was then handcuffed to the bench. I was left there for about an hour. My sister was again called, who came and got me. While my sister was told that I was barred and could not go back to the Hospital at all, I had not been told this. All of my VA property was confiscated, but my purse, my keys, and my personal papers except for my campaign posters were gotten by my sister and I was then escorted to a police car, driven to my car, and escorted off of the property. I was also given two tickets. One for resisting arrest and one for boisterous attitude.

The Union filed a grievance on the March 21, 1997 barring of myself and Mr. Gordon from the premises. The Union received an April 11, 1997 Agency decision to the third step of the grievance.

I was unable to appeal this third step decision to an arbitrator because the then acting Union President, Parker, would not process it. I know that Mr. Gordon, and myself attempted to contact higher Union officials to invoke arbitration, but we were unsuccessful in our efforts. I wrote Ray Flores but he explained that I needed to read Article 18 of the National Constitution and that I had to have the members override

Mr. Parker in a called meeting. Ultimately, no arbitration was invoked.

On April 2 1997 I received a proposed letter of removal. That letter of proposed removal cites to the incidents on February 21, 1997 and March 21, 1997 discussed above. Mr. Gordon wrote a reply for my proposed removal which rejected by the Activity on April 30, 1997. The Union has filed a ULP about the improper rejection of that written response.

On April 25, 1997, I entered the VAMC property at about 10:00 am. I informed the Union chair of the election committee that I intended to come on base that day to put up my campaign posters. That chair is Anthony McCray, and he controls the easels. I also asked him if he had easels that I had reserved. I then called Dr. Jones Secretary, Cynthia Cox, and left told her that I was coming on station at 10:00 am, and that I would need someone at my office with a key to let me in. I also told her that I had business with EEO, and that I wanted to stop by that office. I told her that I would stop by her office. I believe that call to her satisfied my duty to notify Dr. Jones. I had come on facility two other time after the bar was placed on me, and that one call to Jones's office was enough. I then called the Police and security office as per the instruction and notified them of my upcoming visit. This is evidenced by the Police offices log.

When I arrived, it was raining. I parked in the lot, and entered the main lobby, as I had done before under the restriction. On one earlier occasion I was met in the lobby by a female officer, and on one occasion, I was met outside. Today, no escorts appeared to be looking for me, so I went up to Officer Munoz and asked him if he was my escort. He said he would get me an escort, and he started to walk me towards the police offices. There were cameras in the lobby and I later learned that Mr. Goeber, the now secretary of Veterans Affairs was visiting that day. I was looking at them, when Chief Burke phoned me. He ran up to me and attacked me. He threw me to the ground. I had done nothing to provoke Burke at all. He told Munoz help him after Burke got me on the ground. I asked what they were doing as I had called in. At that point, they were pulling me across the floor. I was dragged about 40 feet, and both were out of breath. Burke then said that I should be cuffed. I yelled as he yanked my arm around my back.

Burke said that he was not listening to me, that I was under arrest. Munoz put his knee in my back. Again my wrists were hurt by the tight cuffs. I was dragged to the cell, which wounded my foot - which still hasn't healed. No one knew why I was arrested, and I told the officers the cuffs hurt me. About an hour later, I was stripped searched and the cuffs were loosened. Gray then came into the cell. I said that I wanted a Union representative. Gray asked who was representing me, and ultimately, a new steward, Sebro Lystra came to my aid. Gray read me my rights at that point. He said that he didn't know why I was being arrested. I had called an attorney by that point. Lystra was later told that she could not stay with me and she was told to leave. She left. I then waited for about two hours. My lawyer then called. Burke spoke to my attorney. I then spoke to my attorney, who said that I was arrested for assaulting an officer and for trespassing, and that the prosecutor was going to issue a warrant for my arrest and that I would be taken to the county jail. The Attorney said that he would call people, and arrange bail. He said the process would take 2 hours.

I was lead out of the hospital grounds in chains, and I believe it violates the contract for that to occur. I was then taken to the county jail, and booked for trespassing and for assaulting an officer. The specific charges were both misdemeanors, trespassing and simple assault. I have learned, after I and my attorney requested a jury trial, that the VA dropped the charges. The clerk told me this. This was in the Harris County District County court.

On May 2, 1997, I received the final decision regarding the proposed discharge. In it, I was informed that I was going to be terminated on May 9, 1997. On May 9, 1997, the termination became final. On May 9, 1997, Abraham Gordon filed a grievance on my behalf about the dismissal. That grievance referenced the situation including the Activity's failure to accept Mr. Gordon's response that was written on my behalf to the proposed removal. The Union received a written response to the third step of that grievance on May 22, 1997 which denied the grievance. The Union has invoked arbitration on that grievance, and a hearing date is set for August 18, 1997.

The election for the Union was set on May 8, 1997. As a result of the

election, Mr. Gordon was elected President instead of Dorothy King. Moreover, I was elected the First Vice President for the Professional Unit on May 8, 1997.

On May 19, 1997, after I had been duly elected as a Union officer, the Activity removed an access bar from Mr. Gordon, and made my a permanent total bar. This was done in writing. On June 17, 1997, after many of the ULP charges were filed, the Union filed a grievance over the permanent bar from the facility. On July 7, 1997, the Union withdrew that grievance, as it elected to proceed with the Unfair Labor Practice Charges. As such, no standing grievance regarding the permanent bar from the facility remains.

The bottom line in this situation is that despite the fact I won election as a Union officer, I am not permitted at all to be on the premises.

Charge DA-CA-70570

This charge is limited to the events outlined above that occurred on February 21, 1997. Specifically, on that date the Union contends the Activity violated the statute by interfering with my handing out of fliers which is my right, by improperly arresting me and detaining me, by improperly interfering with the Union's attempts to hold a meeting in the conference room. As regards the meeting, management, by watching the area attempted to coerce and intimidate the employees. I also believe that the Activity was improperly assisting Parker which represents interference in internal union affairs.

The VA here in Houston permits others to pass out fliers and thus I should have been able to pass out the fliers. I felt my conduct was proper because the FLRA legally stated that I had a right to distribute the fliers and to communicate directly to the employees. As such, I felt I was just exercising my rights. That FLRA Dismissal Letter was from charge No. DA-CO70043. I feel that I was not doing anything wrong, and as such I did not have to comply with the incorrect orders being given to me. Moreover, I have never been told that Warren Robicheaux had any authority over me, or any right to give me any order. As such, I felt that I was justified in continuing my actions, and the party who erred was Robicheaux. I felt that on the hierarchy of the

VA, and in the spirit of partnership, I was on an equal level with Robicheaux, and thus, since I was only exercising my legal rights, I was not obligated to comply with their directive. Robicheaux never stated that the director had designated him. I think that it was against our contract for him to sensor our fliers. Moreover, Robicheaux should have gone to Parker if he felt there was a problem with my conduct. His failure to do that means that my rights were violated. There are procedures to be followed and Robicheaux failed to follow them.

Many employees related to me that they were frightened by the Activity's actions. They feared what would occur to them. Those employees included Muhammad Abdullah, Pat Jordan, Margaret Forte my sister, Brenda white, Mary Hardin, Colivia Rocquemore, Diane Nagy, Barbara Anderson, Oliver Bonner, Roger Walls, Lysto Sebro and there are many others. All of the above witnessed some part of the Activity's conduct toward me on February 21, 1997.

DA-CA-70536

This charge is not intended to address the March 21, 1997 bar of myself from the premises because we filed a grievance over that incident. The charge is intended to address that May 19, 1997 permanent bar of myself from the facility.

The Union contends that the Activity had no legitimate reason from barring me from the premises either time. It is true that a grievance was filed regarding the first bar. The Union s grievance over the second bar was filed after this ULP charge was filed and has been withdrawn. As such, the Union contends there is no bar of the May 19, 1997 action.

The Union contends that the real reason I was barred from the facility is because of my protected activity. First of all I did not threaten Mr. Parker, and as such, the permanent bar which is based on that incident is not supported by the facts. Second of all, as discussed above, I was engaged in protected activity and was only exercising my rights when I was arrested twice. As such, the Activity is responsible for those incidents, and the bar cannot be legitimately justified on those events.

Third, I know of several instances when others engaged in activity which is worse that then the activity of which I have been accused. For example, in mid 1996, I represented Dr. Maddox who was a dentist who was accused of stating to another Doctor in a hallway in front of witness, "You SOB, I have a permit to carry a gun, and I know how to use it." When Maddox's service chief took Maddox into his office to find out what was occurring, Maddox took a baseball bat out of his bag and whammed it across the service chief table, stating that Maddox had had enough of Dr. Schorr. I know this because I represented Maddox at a proposed removal. Dr. Maddox wound up having a thirty-day suspension. Indeed, the Hospital even suggested that Maddox serve the 30 day suspension on duty -which did not occur. Maddox was never barred from the facility, and he still works at the
VA.

I also know that a patient brought a gun on station, and pulled it on another employee. This occurred in or around May of 1997, and that patient was not barred from the facility.

Antee Thomas, who was an employee in the facility threatened and assaulted his girl friend, Saundra, who also works here. Thomas was not removed, or barred from the facility. I also know about Duncan Clark, a police officer, a month ago arrested a patient in the outpatient area for beating his wife. The patient threatened to kill his wife. Clark wanted to arrest the patient but Burke told Clark not to arrest the patient, but to instead ticket the patient and let him go.

I know that other employees have engaged in serious conduct that has not resulted in bar's. My representative, Abraham Gordon will provide additional testimony about those specific incidents.

I think that the real reason why I was barred is because the Director did not want a professional Union, and thus, by getting rid of me, the Agency could seriously impair the representation of the Professional Unit. The Director never said that to me. I conclude this because of the number of ULP's that the Activity has filed on me in the last year. Moreover, in a meeting with Larry Hughes, Chief FIMIL, in

November of 1996, Hughes told me that I was dabbling in areas that were not my concern, and that the Activity would stop me. I asked if that meant he would fire me, and he said if he had to. That statement was made in front of Abraham Gordon , Haymon Parker, Dorothy King, Oletha Evans, and Kamal Malek. Dr. Young, the chief of staff also stated to me in that meeting that what they do for Doctors is not my concern and that he would take me to court if I continued to slander him. I believe that at that meeting, after Gordon and I walked out, management decided that I and Gordon were going to be gotten rid of. The Union secretary so testified in an EBO hearing. I will provide the FLRA with a copy of her affidavit.

Thus I think it didn't matter whatever I did, the Activity was going to get rid of me.

I also believe that the Agency believed if I was fired, I could not hold a Union office. The director even orally referenced that in the Step three grievance meeting. Stott stated that he was not aware of that fact Present at that meeting were myself, Gordon, and Mr. Stott.

DA-CA-70556

I already provided testimony about the gun incident above. That incident involved Jeffrey Prosen as the patient offender who was not barred. This charge is intended to point out the disparate treatment between myself and Prosen.

DA-CA-70596

This charge is also intended to reflect that the May 19,1997 bar impacted my ability to perform my duties. As a remedy for the bar, I would like the following:

Desired Remedies

As a remedy to this ULP, I want to see Robicheaux removed for his actions which violated my rights. I would also like to see Chief Burke removed for his duties. I would like my job back and the bar lifted.. As this incident was listed on the proposed removal, I think there is a

nexus between it and the removal. I would like the Agency to cease interfering with internal Union affairs. I would like the Agency to seriously review four ULP's that Robicheaux has filed on me about my passing out fliers and communicating with employees. I want Robicheaux's conduct stopped. I also want the Agency to promulgate my rights to communicate to the employees throughout the hospital as accorded under the law.

I realize that the FLRA does not have jurisdiction over the discharge. That issue is set to be addressed by the arbitrator.

I have read the above statement consisting of twelve pages, and, under oath say, to the best of my knowledge or belief, it is true. The information I provided in this affidavit is all the evidence I have in this case at this time.

Affiant's Signature

Date

Subscribed and sworn to me this 23rd day of July 1997

Authority Agent's Signature

INITIALS

April 11, 1997
Robert Stott, Director
THRU: James W. Jones, M.D., Chief, Surgical Svc.
Department of Veterans Affairs
2002 Holcombe Blvd.
Houston, Texas 77030

RE: Proposed Discharge Received on April 5, 1997

This submittal represents my written reply in the above-referenced cause.

This unjustifiable letter of proposed discharge (Attachment IA), is nothing more than a pretext to discharge ifs. Forte' because of her role as a union representative, as Chief Steward, American Federation of Federal Employees (AFGE), for the professional employees.. Ms. Forte' has been harassed, threatened, and has suffered maltreatment ever since she became a union steward. My position is base a- on the following:

The VA Medical Center (VAMC) officials filed numerous Unfair Labor Practice (ULP) charges against her because of her union activities and for distributing flyers regarding union internal affairs (see Attachment IB) Case No. DA-CO-60756).

Charge A, February 21, 1997, VAPIC Chief of Police, Hr.> David Burke, harassed Ms. Forte', and issued her an unlawful order to discontinue passing out flyers, and announcing an unauthorized" meeting. The VAMC police chief interfered with Union affairs, in Violation of Case No. DA-CO-60756, dated January 31, 1997, issued to Mr. Warren Robicheaux, Labor relations Specialist, which states on Page 2, Section 7102 of the Statute that employees are guaranteed the right during non-work tine to distribute literature in non-work areas.

The Chief of Police has no authority or jurisdiction over. what is authorized for the union. Ms. Forte' was on Annual Leave (AL), and not in a work area. Her being arrested, brutalized, handcuffed, her dress pulled up over her head, exposin; her body, and then being carried through the main lobby at the VAMC main building by five (5) police officers is shameful, shocking, disgraceful, and without merit and/or good cause-. The VAMC further violated the Federal

Service Labor Management Relations Statute (ULP) 7116 (a) which states "for the purpose of this chapter, it shall be an unfair labor practice for an agency (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right -under -this chapter.

Clearly, the VAMC violated said stature.

Charge B, February 21,1997, is not related to Ms. Forte's duties.

This charge arose from Union internal affairs.

The VAMC Director,. along with Mr. Haymon Parker, so-called and self-appointed President of Local 1633 violated 7116 (3) of the statute, which states:
(3) "to sponsor, control, and otherwise assist any labor organization, other than to furnish upon request, Customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;"

The Director assisted Mr. Parker because Ms. Forte' challenged Mr. Parker's position in lieu of the Union's constitution and bylaws. The petition came to be because Mr. Parker fired me, the Union Advocate.

Mr. Parker and the VAMC Director violated said statute...

As Ms. Forte a representative, I contend that Charge B is not related to patient care, or Ms. Forte's duties in any way, shape, form, or fashion. This matter is clearly Union internal affairs and vindictive. The VAMC police chief and officers gave rise to charges A, B, C, D, and K, by interfering with Union internal affairs. These charges are not a nexus or related to her duties or patient care and these are clearly Union internal affairs. whereby she is covered under the statute governing protected Union activity.

Ms. Forte' should not have to suffer constant police harassment condoned by the Director. This is punitive in nature to say the least.

The proposed discharge violates 7116 (4), thereof, which states-
(4) "to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or

has given any information or testimony under this chapter;"

This representative argues that to propose a discharge because-if Ms. Forte' was engaged" in a petition pursuant to Union internal affairs is an abuse of authority and power, not to mention blatant violation of referenced Federal statutes, which permit her to do so This is a reckless disregard for the statute.

Charge C, February 21, 1997, is unfounded, erroneous, slanted, biased, and designed to support the Director in discharging Ms. Forte' because of her Union activities. The Director and Mr. Parker harassed Ms. Forte' to no end.

Ms. Forte' was arrested on two (2) separate occasions, upon the recommendation of the AFGZ (Acting) President. This is a gross violation, for the YAMC Director to hare interfered with Union internal affairs, assisting the AFOS (Acting) President in such a manner. The situation described in Charge C did not occur as stated.

Once again, at best, the charge is constructed pursuant to Union internal affairs in violation of protected Union activities under said statutes. Charge D is based, and constructed on Mr. Parker's allegations. Mr. Parker's statement is biased, and he has an ulterior motive to remove Ms. Porte' as Chief Steward. Even though he did not have the authority, he fired her as Chief Steward, and had the VAMC Director bar her from VAMC premises. A8ain, the Director interfered in Union internal affairs, in direct violation of said statutes.

The Director, in essence, states that Ms. Forte' used obscene and abusive language, and threatened to inflict bodily injury to another. He is relying on these allegations. Let me examine his double standards and parity pursuant to bodily harm---CASES IN POINT

Mr. Mike Caslin.(.white) threatened to kill Mr.Henry Hartsfield, his black supervisor. Mr. Caslin received a thirty calendar day suspension. I represented him in this matter.

Mr. Williams, a black male beat the crap out of a black female in the Special Processing Distributing (SPD) Service. On his first offense, he received a 14-day suspension. The second time he beat the crap out of the same female, he received a removal. I represented him in this matter. I am not disagreeing with the penalties. r am

substantiating the parity. Clearly, the VAMC Director is anti-Union, and anti-Forte'. Further, this charge against Ms. Forte is slanted, taken out of context, and unfounded.

Since when has the Director been concerned about Blacks calling Blacks **names?** His black Service chief in SPD treats Blacks in the most despicable way one can imagine. Approximately ten (1O) Blacks signed a group grievance stating Ms. Lakey called them "stupid niggers," and stated she could do and say what ever she wanted, because the front office would back her up. The VAMC Director denied the grievance, did not interview the employee and stated that he found no merit to the allegations without even investigating the matter.

A black male supervisor in SPD, six months ago, sexually harassed Ms. Dorothy Cole, an employee in his department (SPD). When she refused his advances, he called her a tight ass-nigger whore. She filed a discrimination complaint against him. The VAMC Director gave her a fourteen (14) calendar day suspension for insubordination! This is substantiated by records.

A white male Registered Nurse (RN) called a black female a nigger. She filed a grievance. The VAMC Director asked the white male RN to be more careful. He and Ms. Dorothy ring, now the so-called (Acting) AFGE President (Mr. Haymon Parker resigned his post, for some reason, several days ago, and Ms. ring, Chief Steward for non-professional employees, AFGE!, has somehow assumed his post. This is one of the Union internal affairs problems that we are currently trying to rectify.) resolved this matter together!

Charges D and E are prejudicial, and made by Mr. Haymon Parker. When Mr. Parker and two (2) Union Stewards met with the Honorable Sheilia Jackson Lee in Washington; pertaining to Ms. Forte' being handcuffed, arrested, and ticketed, he lead Congresswoman Lee to believe that it was the VAMC Directors fault about the incident described in Charges A, B. an4 C. He informed her that he had told the VAPIC Director that he would support Ms. Forte' because she is a good Union Steward. How can anyone put credence in Charge D?

The reason that Ms. Forte' was issued a proposed discharge is that we challenged the VAMC Director over so many grievances. We stated that he was taking actions against employees to out-arbitrate the

Union. We suggested that he create an impartial panel to hear Borne of the cases, prior to arbitration, at the proposed stage. Ms. Oletha Evans, former AFGE President, also requested this at the labor/management partnership meeting. The VAMC Director stated that he would not do that. Ms. Forte' and I informed him that we would inform the public that he is wasting tar payer a tax dollars processing so many arbitrations. We challenged him, and he-used a Union internal matter to propose Ms. Forte's discharge. He duped Mr. Haymon Parker, the so-called (Acting) APOS President. He is now duping Ms. Dorothy ring; the now so-called (Acting) APGE President. . She's demonstrated to us that she shares the opinion of the VAMC Director that Ms. Forte' and I should not be allowed on VAPIC property, and that the - -employees cannot have the representative of their choice.

IN CONCLUSION, I have been a Union Advocate for the past thirty-five (35) years. I am a retired VAMC employee. During my tenure, I had the opportunity to work under many Directors. Without a doubt, Mr. Robert Stott is the worst I've ever encountered. He is ill advised by the Chief of Human Resources Services, Mr. Larry Hughes, and Associate Director, Mr. Adam Walmus. He and his staff have demonstrated to me that they are unconcerned about the quality of patient care this VAMC provides, by interfering with Union internal affairs! Not only are tax payers dollars being wasted while they dedicate their own time to same, but they further abuse their authority to order the VAMC police officers to leave their assigned duties to aid in this interference (not to mention the overtime dollars spent on VAMC police interference during Union meetings). These police officers should be protecting the VAMC premises, and the patients, and staff members. The Oklahoma bombing incident comes to my mind! Who is "watching the store" when police officers have been told to dedicate themselves to harass Ms. Forte' and I? This is frightening!

In an effort to rectify the-AFGE internal problems some twenty-five percent of the work force signed a petition for a if special called" meeting to re-instate me as the representative. The Director and Mr. Haymon Parker ignored the petition. Now, Ms. Dorothy King is doing the same thing by joining forces to bar Dorothy Forte' and I from the premises. We have been treated like common criminals, to say the least, and the employee morale is at a all time low. They have seen

Mr. Stott, their role model, ignoring laws, rules, and regulations. They've seen Acting Presidents inserting themselves into office, and being supported and defended by Mr. Stott. These employees are stunned to see that things are totally out of control. Logic would dictate that patient care has to suffer for this. Since Ms. Forte' has been arrested on two different occasions, issued a total of five (5) tickets, and given a proposed discharge, employees are bitter, to say the least. Ms. Forte's discharge from employment will not remedy Mr. Stott's problems, and not stop her from representing employees she will always be a Union member, and free to become a Union officer.. The Director is not sagacious enough to handle the labor management problems he creates, and 'to escalate matters adverse to Management and the Union. . It's -a shame and a fact! He utilizes the police to curtail his labor issues, instead of using reasoning and prudence. His actions bring back to mind-the behavior of those who were in authority during the Civil rights struggle. when police, police dogs, water hoses etc. were used against those who merely wished to obtain their civil rights. At the present time, he is using the police. I expect to see dogs and water hoses next.

Ms. Forte[1] is clearly being harassed. She was issued a total of five (5) tickets for Union internal affairs, in violation of the referenced statutes. To impose a proposed discharge for the same so-called offenses is vindictive, revengeful, and an abuse of authority! To bar Ms. *Forte* and I from VANC premises is without merit and/or good cause. This is nothing more than a prefer to interfere with Union business and deny employees their rights. If the Director does not rescind his unwarranted actions against Ms. Forte and I commencing April 21, 1997, r will picket him until someone in authority recognizes that his actions are motivated self-serving, and in violation of Federal Statutes governing protected activity. Further, the unjustified proposed discharge issued to Dorothy Forte' should be rescinded, and the Director be forced to cease and desist from interfering in Union internal affairs. In addition, he should take a course in labor management and diversity training. The VAMC, Houston, Texas is probably surpassing all other VAMC hospitals, nation-wide in the number of Equal Employment Opportunity (EEO) complaints, removals, and other disciplinary actions. The reason he issued Ms. Porte' a proposed discharge is because she and I disagreed with his actions regarding the partnership of labor and management He created his own leadership council without including any Union representatives to veto matters passed by the partnership we

challenged him on this, and stated he was making a mockery of Jesse-Brown's directives. He stated that he is the Director, and that he has the authority to do so. This Director behaves like a dictator, demonstrates that he has no respect for higher authority--including that of Secretary Jesse Brown. His punitive behavior gives a very clear signal of abuse of power without parity and capriciousness. In reflection of the wholesale mess and uproar he has caused to the VAMC employees, along with his constant interference in Union internal affairs, Mr. Stott cannot possibly create and maintain an atmosphere conducive to the quality patient care that we owe to our veterans.

I respectfully request that a higher authority set aside this unjustified proposed discharge issued to Ms. Forte', and rescind his order to bar Ms. Forte' and I from VAMC premises. We are citizens, .tax payers and veterans deserving our civil rights, not hard-core criminals!'- Banning us from the premises is nothing more than a ploy to interfere with the Union election to be held on May 8. 1997. The proposed discharge of Ms. Forte' is designed and put into place with the purpose of assisting Ms. Dorothy King to become AFGE President at any cost and banning Ms. Forte and I is in violation of the Federal Statute 7116 (1) (3) (4) and (7), thereof. He is violating the democracy process by not allowing us on the premises to campaign the same as any other candidate may do. His tactics and letters are reprehensible, dictatorial, and contrary to the struggle that Blacks fought and died for. His actions violate the voting process in principle, spirit, and intention. I am PLEADING TO MR. STOTT'S SUPERIORS to rescind this unjustified letter of proposed discharge and letters barring us from the election process. Failure to do so will leave me no choice but to bring appropriate suit against VAMC officials. FURTHER, THIS IS A FORMAL REQUEST that Mr. Stott cease and desist from interference in Union internal affairs.

Respectfully Submitted by

ABRAHAM GORDON

Supreme Court, U.S.
FILED
MAR 1 - 2000
CLERK

(2)

No. 99-941

In the Supreme Court of the United States

DOROTHY FORTE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may raise, for the first time before this Court, First and Eighth Amendment challenges to her discharge from federal employment for obscene and abusive language and disrespectful conduct to Veterans' Administration police officers.

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Sup. Ct. R. 10 6

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 194 F.3d 1338 (Table). The decision of the arbitrator (Pet. App. 3-73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1999. The petition for a writ of certiorari was filed on September 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was formerly employed as a nurse at the Veterans' Administration Medical Center in Houston, Texas, for six years. Pet. App. 35. She also served

as chief steward for the union of professional employees at the hospital. *Id.* at 36. On the morning of February 21, 1997, petitioner was in the lobby of the hospital passing out flyers announcing a meeting that concerned the firing of a local union representative by Haymon Parker, the then-acting local union president. *Id.* at 36-37. Because the time and place of the meeting as stated on the flyer conflicted with a previously scheduled meeting, Warren Robicheaux, the senior labor relations specialist at the hospital, questioned petitioner about the flyer. *Id.* at 37. Petitioner at first ignored Robicheaux, but then began yelling at him. *Ibid.* Robicheaux instructed petitioner to stop distributing the flyer and to stop shouting, but petitioner continued. *Ibid.* Robicheaux then summoned the Chief of the VA Police and Security Service. *Id.* at 38. When security arrived, petitioner again was asked to cease distributing the flyer and to stop causing a scene, but she remained belligerent. *Ibid.* When one officer tried to reach for her arm, petitioner dropped to the floor and began kicking and screaming. *Ibid.* Four officers then subdued and handcuffed petitioner; in the process, one officer was kicked in the shoulder and another was kicked in the left hand or forearm area. *Id.* at 38-39.

One month later on March 21, 1997, petitioner telephoned Haymon Parker in his office at the hospital, cursing him and stating, "You are a dead man." Pet. App. 39. Petitioner did not identify herself, but Parker recognized her voice. He had recently removed her as chief steward for the union. *Ibid.* Parker was shaken by the telephone call and an incident later that afternoon when someone banged loudly on his office door; the VA police were called. *Id.* at 39-40.

Petitioner was called to the VA police office for questioning by Sergeant Fred Gray. Pet. App. 40. While

being questioned, petitioner shouted at Sergeant Gray, using profanity and a racial epithet. *Id.* at 41; Pet. 3. Petitioner was then given a letter barring her from the VA Medical Center and placing her in a non-duty paid status. Pet. App. 41. After petitioner refused to read or sign the letter, it was read to her. Shortly thereafter, petitioner jumped up from her seat in the police office and ran for the door leading back into the hospital. *Ibid.* Two officers physically stopped petitioner, and she was restrained and temporarily placed in a holding cell. *Ibid.*

As a result of these incidents, the hospital issued petitioner a notice of proposed discharge on April 2, 1997, specifying five charges against her. Pet. App. 41-42, 84-87. The first three charges related to the February 21, 1997 incident, charging (a) deliberate refusal to carry out a proper order, (b) attempt to inflict bodily injury upon VA police officers, and (c) obscene language and disrespectful conduct. *Id.* at 84-85. The remaining two charges stemmed from the events of March 21, 1997, charging (d) use of obscene language, disrespectful conduct, and statements constituting a threat to inflict bodily injury upon Parker, and (e) obscene and abusive language and disrespectful conduct to Sergeant Gray and other VA police officers. *Id.* at 85.

2. Pursuant to the terms of the collective bargaining agreement, petitioner invoked arbitration. Following a seven-day hearing, the arbitrator upheld the hospital's removal action based upon Charge (e) alone. Pet. App. 72-73. The arbitrator found that the agency had proved that petitioner committed the misconduct underlying all five charges. *Id.* at 46-60. The arbitrator also concluded, however, that there was not a sufficient nexus between the misconduct in the first four charges and promoting the "efficiency of the service," as required by

5 U.S.C. 7513(a) for a removal action. Pet. App. 72-73. Instead, the arbitrator determined that those actions related to union activities and an internal union dispute. *Id.* at 73. As for the last charge, however, the arbitrator concluded that it was "fundamentally different" from the other charges because there was a sufficient nexus between the efficiency of the service and petitioner's "totally inappropriate" conduct. *Ibid.* The arbitrator further held that the penalty of discharge for that conduct was reasonable. *Ibid.*

3. Petitioner appealed to the Federal Circuit. That court affirmed without opinion. Pet. App. 1-2.

ARGUMENT

The court of appeals correctly affirmed the arbitrator's decision to uphold petitioner's termination. The judgment of the court of appeals does not conflict with the decisions of this Court or any other court of appeals. Furthermore, neither the arbitrator nor the court of appeals has decided an important question of federal law that needs to be addressed by this Court. Further review is not warranted.

1. Petitioner's claims (Pet. 5-9) are not properly before this Court. At no time in the proceedings before the arbitrator or before the court of appeals did petitioner raise any First or Eighth Amendment claim with respect to her termination.[1] This Court ordinarily will not consider in the first instance issues that were

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[1] Petitioner did argue before the court of appeals that her removal was a pretext for retaliation for her union activities. Pet. C.A. Br. 15-18. That claim, however, was not presented as a First Amendment claim. Moreover, that claim was never presented to the arbitrator (Pet. App. 32-35) with "sufficient specificity and clarity" and thus was waived before the Federal Circuit. *Wallace* v. *Department of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989).

not raised or decided below, especially when the issue is raised in seeking reversal of the judgment. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Pennsylvania Dep't. of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n.23 (1989). Petitioner presents no reason to deviate from this settled principle.

2. Even if petitioner's First Amendment claims were properly before this Court, they are without merit and would not warrant review. Petitioner contends that her termination violated her First Amendment rights because (1) it was based solely on her utterance of a racial slur and (2) it was a pretext for retaliation on account of her union activities. Pet. 5-9. Although petitioner did not forfeit her First Amendment right to speak out or legitimate matters of public concern as a condition of public employment, see *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968), this Court has held that

> when a public employee speaks not as a citizen upon matters of public concern, *but instead as an employee upon matters only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. *Myers*, 461 U.S. 138, 147 (1983) (emphasis added). See also *Waters* v. *Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion) (noting that government employer can bar its employees from using offensive utterances to people with whom they work). Petitioner's racial slur against the hospital security sergeant was

plainly not speech about a matter of public concern, but simply a display of her own personal animus toward a fellow hospital employee. The First Amendment does not prevent a public employer from terminating an employee for utterances like that of petitioner, especially when accompanied by conduct such as hers.

Petitioner additionally claims (Pet. 9) that she was removed because of "her aggressive pursuit of protected activities." That factual argument is inconsistent with the arbitrator's detailed findings. The arbitrator found that Charge (e) in particular, involved "misconduct while on the job" in reaction to the employer's "legitimate and proper" investigation into alleged threats. Pet. App. 60. The arbitrator also found that petitioner did not prove that the agency had conspired with petitioner's opponents in the union to harass her and her supporters. *Id.* at 66-67.[2] Petitioner cites no evidence to support her claim or to cast doubt on the arbitrator's finding that she was removed to promote the efficiency of the service. Further review of this factual issue is unwarranted. See Sup. Ct. R. 10.

3. Likewise, petitioner's Eighth Amendment claim, if properly before this Court, is without merit. Relying on the Cruel and Unusual Punishment and Excessive Fines Clauses of the Eighth Amendment, petitioner contends (Pet. 9) that her discharge "constitutes disproportionate punishment for the offense committed." The Cruel and Unusual Punishment Clause, however, applies only to criminal prosecutions and punishments.

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[2] Because petitioner did not raise retaliation as an issue, the arbitrator made no specific finding on that question. Had petitioner alleged retaliation, however, she would have borne the burden of proving it. See *Webster* v. *Department of the Army*, 911 F.2d 679, 689 (Fed. Cir. 1990), cert. denied, 502 U.S. 861 (1991).

See *Whitley* v. *Albers*, 475 U.S. 312, 318-319 (1986); *Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham* v. *Wright*, 430 U.S. 651, 664, 666-668, 671 n.40 (1977). Petitioner's termination from employment therefore presents no claim of cruel or unusual punishment.

The Excessive Fines Clause is also inapplicable to this case. As this Court has stated, "at the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a *payment* to a sovereign as punishment for some offense." *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 265 (emphasis added). Also, "the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Id.* at 268. See also *Austin* v. *United States*, 509 U.S. 602, 609-610 (1993) (noting that Excessive Fines Clause limits power of government to extract payments as punishment for an offense). Because petitioner has been assessed no fine, she has no claim under the Excessive Fines Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuily submitted.

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MARCH 2000